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SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 23 OF THE RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-13-0040 **FILED 08/28/2013**

ORDER
AMENDING RULE 23, ARIZONA RULES OF CIVIL PROCEDURE, ON AN EXPEDITED BASIS

A petition having been filed on July 11, 2013, by David K. Byers, proposing to amend Rule 23, Arizona Rules of Civil Procedure, on an expedited basis in response to the Legislature's recent passage of Senate Bill 1346 (Laws 2013, Chapter 241), which will become effective September 13, 2013, upon consideration,

IT IS ORDERED that Rule 23, Arizona Rules of Civil Procedure, be amended on an expedited basis pursuant to Rule 28(G), Rules of the Supreme Court, in accordance with the attachment hereto, effective September 13, 2013.

IT IS FURTHER ORDERED that this matter shall be opened for comment in accordance with Rule 28(G)(2), Rules of the Supreme Court, until October 25, 2013.

DATED this _____ day of August, 2013.

_____
REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
David K Byers

Appendix[1]

Arizona Rules of Civil Procedure

Rule 23. Class Actions

Rule 23(a)-(b). [No change in text.]

Rule 23(c). Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall hold a hearing and determine by written order whether it is to be so maintained. The court shall set forth its reasons and shall describe all evidence in support of its determination. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) - (4) [No change in text.]

Rule 23(d)-(e). [No change in text.]

Rule 23(f). Appeals

The court's order certifying or denying class action status is appealable in the same manner as a final order or judgment. During the pendency of an appeal under A.R.S. § 12-1873, all discovery and other proceedings shall be stayed except that, on motion of a party, the court may permit discovery proceedings to continue.

[1] Changes or additions in rule text are indicted by underscoring and deletions from text are indicated by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 47(a)(3), ARIZONA RULES OF CIVIL PROCEDURE, AND RULE 18.6(b), ARIZONA RULES OF CRIMINAL PROCEDURE	Arizona Supreme Court No. R-13-0022 **FILED 08/28/2013**

ORDER
AMENDING RULE 47(a)(3), ARIZONA RULES OF CIVIL PROCEDURE, and RULE 18.6(b), ARIZONA RULES OF CRIMINAL PROCDURE

A petition having been filed proposing to amend the rules pertaining to the jurors' oath in civil and criminal proceedings, and comments having been received, upon consideration,

IT IS ORDERED that Rule 47(a)(3), Arizona Rules of Civil Procedure, and Rule 18.6(b), Arizona Rules of Criminal Procedure, be amended as modified, in accordance with the attachment hereto, effective January 1, 2014.

DATED this _____ day of August, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
Robert M Brutinel, Chairperson, Committee on Impact of Wireless Mobile Technologies
Mark E Meltzer
John A Furlong

ATTACHMENT*

ARIZONA RULES OF CIVIL PROCEDURE

Rule 47(a). Trial Jury Procedure; List; Striking; Oath

1. [No change in text.]

2. [No change in text.]

3. After the jury is completed, the clerk shall make a list thereof and deliver it to the parties for peremptory challenges. The parties shall exercise their challenges by alternate strikes, beginning with the plaintiff, until the peremptory challenges are exhausted. Failure of a party to exercise a challenge in turn shall operate as a waiver of remaining challenges but shall not deprive the other party of that other party's full number of challenges. The list shall then be delivered to the clerk who shall call the first eight names remaining on the list who shall constitute the trial jury, and to whom an oath or affirmation shall then be administered in substance as follows: ~~"You do solemnly swear (or affirm) that you will well and truly try the issues now on trial and a true verdict render according to the law and the evidence, so help you God."~~ Do you swear (or affirm) that you will give careful attention to the proceedings, follow the court's instructions, including the admonition, and render a verdict in accordance with the law and evidence presented to you, so help you God?" If a juror affirms, the clause "so help you God" shall be omitted.

4. [No change in text.]

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* Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULES 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74 AND 77, ARIZONA RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-13-0017 **FILED 09/06/2013**

AMENDED ORDER

AMENDING RULES 16, 16.1, 26, 37, 38, 38.1, 72, 73, 74 and 77, and PROMULGATING FORMS 11(a) and (b), 12(a) and (b), and 13(a) and (b), RULE 84, APPENDIX OF FORMS, ARIZONA RULES OF CIVIL PROCEDURE

On August 28, 2013, the Court adopted amendments to the above rules and promulgated new forms as part of Rule 84, Arizona Rules of Civil Procedure. In doing so, however, the Court inadvertently omitted in the Attachment to the August 28 Order proposed subsections (K) and (L) of Rule 16(b)(2), Arizona Rules of Civil Procedure. Therefore,

IT IS ORDERED that Rule 16(b)(2) shall be further amended by adding subsections (K) and (L).

IT IS FURTHER ORDERED that the original Attachment A to the August 28, 2013 Order shall be revised accordingly. Attachments A and B to this Order reflect all amendments to the rules and

forms adopted in the August 28 Order and in this Amended Order.

DATED this _____ day of September, 2013.

_____
REBECCA WHITE BERCH
Chief Justice

ATTACHMENT A*

ARIZONA RULES OF CIVIL PROCEDURE

Rule 16. ~~Pre-Trial Conferences;~~ Scheduling; and Management of Cases

Rule 16(a). ~~Pretrial conferences; o~~Objectives of Case Management

~~In any action, the court may in its discretion direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate, either in person or, with leave of court, by telephone, in a conference or conferences before trial for such purposes as:~~

In accordance with Rule 1, the court shall manage a civil action with the following objectives:

~~1.~~ (1) expediting ~~the~~ a just disposition of the action;

~~2.~~ (2) establishing early and continuing control so that the case will not be protracted because of lack of management;

~~3.~~ (3) discouraging wasteful, expensive and duplicative pretrial activities; ~~and~~

~~4.~~ (4) improving the quality of ~~the trial~~ case resolution through more thorough and timely preparation;

(5) facilitating the appropriate use of alternative dispute resolution;

(6) conserving parties' resources;

(7) managing the court's calendar to eliminate unnecessary trial settings and continuances; and

(8) adhering to applicable standards for timely resolution of civil actions.

(*Additions to text shown by underscoring; deletions by ~~strikeouts~~.)

Rule 16(b). Joint Report and Proposed Scheduling Order

(1) This section (b) applies to all civil actions except:

A. Medical malpractice cases;

B. Cases subject to compulsory arbitration under Rule 72(b);

C. Cases designated complex under Rule 8(i)(6); and

D. Cases seeking the following relief:

i. Change of name;

ii. Forcible entry and detainer;

iii. Enforcement, domestication, transcript, or renewal of a judgment;

iv. An order pertaining to a subpoena sought pursuant to Rule 45.1(e);

v. Restoration of civil rights;

vi. Injunction against harassment or workplace harassment;

vii. Delayed birth certificate;

viii. Amendment of birth certificate or marriage license;

ix. Civil forfeiture;

x. Distribution of excess proceeds;

xi. Review of a decision of an agency or a court of limited jurisdiction; and

xii. Declarations of factual innocence under Rule 57.1 or factual improper party status under Rule 57.2.

(2) No later than 60 days after any defendant has filed an answer to the complaint or 180 days after commencement of the action, whichever occurs first, the parties shall confer regarding the subjects set forth in Rule 16(d). No later than 14 days after the parties confer, they shall file a Joint Report and a Proposed Scheduling Order with the court stating, to the extent practicable, their positions on the subjects set forth in Rule 16(d) and proposing a Scheduling Order that specifies by calendar date, month, and year deadlines for the following:

(A) service of initial disclosures under Rule 26.1 if they have not already been served;

(B) identification of areas of expert testimony;

(C) identification of and disclosure of expert witnesses and their opinions in accordance with Rule 26.1(a)(6);

(D) propounding of written discovery;

(E) disclosure of non-expert witnesses;

(F) completion of depositions;

(G) completion of all discovery other than depositions;

(H) final supplementation of Rule 26.1 disclosures;

(I) holding a Rule 16.1 settlement conference or private mediation;

(J) filing of dispositive motions;

(K) a proposed trial date; and

(L) the anticipated number of days for trial.

Unless otherwise ordered by the court for good cause shown, the parties' Proposed Scheduling Order shall state the deadlines for completing discovery and for holding a Rule 16.1 settlement conference or private mediation to occur no more than 15 months after the commencement of the action. The Joint Report shall certify that the parties conferred regarding the subjects set forth in Rule 16(d). The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and participating in the conference, for attempting in good faith to agree on a Proposed Scheduling Order, and for filing the Joint Report and the Proposed Scheduling Order with the court.

(3) The Joint Report and the Proposed Scheduling Order shall be filed using the forms approved by the Supreme Court and set forth in Forms 11-13, Rule 84, Appendix of Forms.

(A) *Expedited*: The parties shall use Forms 11(a) and (b) (Expedited Case) when all of the following factors apply:

(i) Every party except defaulted parties has filed an answer;

(ii) There are no third party claims;

(iii) The parties intend to have no more than one expert per side; and

(iv) Each party intends to call no more than four lay witnesses at trial.

(B) *Standard*: The parties shall use Forms 12(a) and (b) (Standard Case) if the case is not eligible for management as an Expedited Case or Complex Case.

(C) *Complex*: The parties shall use Forms 13(a) and (b) (Complex Case) if the factors enumerated in Rule 8(i)(2) apply, regardless of whether the case has been designated as complex by the court.

Upon request of any party, the court may designate any case as expedited, standard, or complex. The court shall endeavor to conduct trial in expedited cases within twelve months after the commencement of the action.

Rule 16(c). Scheduling Orders

The court shall issue a Scheduling Order as soon as practicable after receiving the parties' Joint Report and their Proposed Scheduling Order under Rule 16(b) or after holding a Scheduling Conference. The Scheduling Order shall establish calendar deadlines specifying the month, date, and year for each of the items included in the Proposed Scheduling Order submitted pursuant to Rule 16(b). The Scheduling Order shall also set either (1) a trial date or (2) a date for a Trial-Setting Conference under Rule 16(f) at which a trial date may be set. Absent leave of court, no trial shall be set unless the parties certify that they engaged in a settlement conference or private mediation or that they will do so by a date certain established by the court. The Scheduling Order may address other appropriate matters. The dates established in a Scheduling Order that govern court filings or hearings may be modified only for good cause and with the court's consent. Once a trial date is set, it may be modified only pursuant to Rule 38.1.

Comment to 2014 Amendment

A primary goal of civil case management is the creation of public confidence in a predictable court calendar. Courts should avoid overlapping trial settings that necessitate continuances when the court is unable to hold a trial on the date scheduled. Continuances of scheduled trial dates impose unnecessary costs and inconvenience when counsel, parties, witnesses, and courts are required to engage in redundant preparation. Although early trial settings may be appropriate, a court should employ a case management system that ensures it will be in a position to conduct each trial on the date it has been set.

Rule ~~16(b~~Rule 16(d). Scheduling ~~and Subjects to Be Discussed at Comprehensive Pretrial~~ Conferences in Non-Medical Malpractice Cases

Except in medical malpractice cases, upon written request of any party the court shall, or upon its own motion the court may, ~~schedule~~ set a ~~comprehensive pretrial~~ Scheduling Ceonference. At any ~~comprehensive pretrial~~ Scheduling Ceonference under this R~~r~~ule 16(d), the court may:

(1) Determine the additional disclosures, discovery and related activities to be undertaken and a schedule therefor.

~~(A) The schedule shall include depositions to be taken and the time for taking same; production of documents or electronically stored information; non-uniform, interrogatories; admissions; inspections or physical or mental examinations; and any other discovery pursuant to these rules.~~

(2) Discuss which form of Joint Report and Scheduling Order is appropriate under Rule 16(b)(3).

~~(B) Among other orders~~ (3) Determine whether the court ~~may enter under this rule, the court may~~ should enter orders addressing one or more of the following:

(~~i~~A) setting forth any requirements or limitations for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced;

(~~ii~~B) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and

(~~iii~~C) adopting any agreements the parties reach for asserting claims of privilege or of protection as to trial preparation materials after production.

(~~2~~4) Determine a schedule for the disclosure of expert witnesses~~. Such disclosure shall be within 90 days after the conference except upon good cause shown.~~ and the method of such disclosure, including whether signed reports from the experts should be required.

(~~3~~(5) Determine the number of expert witnesses or designate expert witnesses as set forth in Rule 26(b)(4)(D).

(~~4~~(6) Determine a date for the disclosure of non-expert witnesses and the order of their disclosure~~; provided, however, that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the completion of discovery~~.

~~Any witnesses not so disclosed shall not be allowed to testify at trial unless there is a showing of good cause. (5) Resolve any discovery disputes which have been presented to the court by way of motion not less than 10 days before the conference. The moving party shall set forth the requested discovery to which objection is made and the basis for the objection. The responding party may file a response not less than 3 days before the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including those permitted under Rule 16(f), against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist discovery.~~

(7) Determine a deadline for the filing of dispositive motions.

(8) Resolve any discovery disputes.

(~~6~~(9) Eliminate non-meritorious claims or defenses.

(~~7~~10) Permit the amendment of the pleadings.

(811) Assist in identifying those issues of fact which are still at issue.

(912) Obtain stipulations as to the foundation or admissibility of evidence.

~~(10~~(13) Determine the desirability of special procedures for management of the case.

~~(11~~(14) Consider alternative dispute resolution and determine a deadline for the parties to participate in a settlement conference or private mediation.

~~(12~~(15) Determine whether any time limits or procedures set forth in the discovery rules or set forth in these rules or Local Rules of Practice should be modified or suspended.

~~(13~~(16) Determine whether Rule 26.1 has been appropriately complied with by the parties.

~~(14) Determine a date for a settlement conference if such a conference is requested by a party or deemed advisable by the court.~~

(~~15~~17) Determine a date for filing the ~~j~~Joint ~~p~~Pretrial ~~s~~Statement required by ~~subpart~~ section (~~d~~g) of these Rules.

~~(16) Determine a trial date.~~

(~~17~~18) Discuss the imposition of time limits on trial proceedings or portions thereof, the use of juror notebooks, the giving of brief pre-voir dire opening statements and preliminary jury instructions, and the effective management of documents and exhibits.

~~(18) Make such other orders as the court deems appropriate.~~

(19) Determine how verbatim record of future proceedings in the case will be made.

(20) Discuss such other matters and make such other orders as the court deems appropriate.

Rule 16~~(e)~~(e). Scheduling and Subject Matter at Comprehensive Pretrial Conferences in Medical Malpractice Cases

In medical malpractice cases, within five days of receiving answers or motions from all defendants who have been served, plaintiff shall notify the court to whom the case has been assigned so that a comprehensive pretrial conference can be set. Within 60 days of receiving the notice, the court shall conduct a comprehensive pretrial conference. At that conference, the court and the parties shall:

(1) Determine the discovery to be undertaken and a schedule therefor. The schedule shall include the depositions to be taken, any medical examination which defendant desires to be made of plaintiff and what additional documents, electronically stored information, and other materials are to be exchanged. Only those depositions specifically authorized in the comprehensive pretrial conference shall be allowed except upon stipulation of the parties or upon motion and a showing of good cause. The court, upon request of any defendant, shall require an authorization to allow the parties to obtain copies of records previously produced under Rule 26.2(A)(2) of these Rules or records ordered to be produced by the court. If records are obtained pursuant to such authorization, the party obtaining the records shall furnish complete copies to all other parties at the sole expense of the party obtaining the records.

(2) Determine a schedule for the disclosure of standard of care and causation expert witnesses. Except upon good cause shown, such disclosure shall be simultaneous and within 30 to 90 days after the conference, depending upon the number and complexity of the issues. No motion for summary judgment based upon the lack of expert testimony will be filed prior to the expiration of the date set for the simultaneous disclosure of expert witnesses except upon a showing of good cause.

(3) Determine the order of and dates for the disclosure of all other expert and non-expert witnesses, provided that the date for disclosure of all witnesses, expert and non-expert, shall be at least 45 days before the close of discovery. Any witnesses not appropriately disclosed shall be precluded from testifying at trial unless there is a showing of extraordinary circumstances.

(4) Limit the number of experts as provided in Rule 26(b)(4)(D) of these Rules.

(5) Determine whether additional non-uniform interrogatories and/or requests for admission or production are necessary and, if so, limit the number.

(6) Resolve any discovery disputes. ~~which have been presented to the court by way of motion within 10 days before the conference. The moving party shall set forth the question or answer to which objection is made and the basis for the objection. The responding party may file a response within 3 days of the conference. No replies shall be filed unless ordered by the court. The court shall assess an appropriate sanction, including any order under Rule 37(b)(2) of these Rules, against any party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist discovery.~~

(7) Discuss alternative dispute resolution, including mediation, and binding and non-binding arbitration.

(8) Assure compliance with A.R.S. § 12-570.

(9) Set a date for a mandatory settlement conference.

(10) Set a date for filing the ~~j~~Joint ~~p~~Pretrial ~~s~~Statement required by subpart (~~d~~g) of this Rule.

(11) Set a trial date.

~~(12) Make such other orders as the court deems appropriate.~~

~~(13~~(12) Determine how verbatim record of future proceedings in the case will be made.

(13) Discuss such other matters and make such other orders as the court deems appropriate.

~~Rule 16(d). Joint Pretrial Statement: Preparation; Final Pretrial Conference~~

~~(1) Counsel or the parties who will try the case and who are authorized to make binding stipulations shall confer and prepare a written joint pretrial statement, signed by each counsel or party, that shall be filed five days before the date of the final pretrial conference, or if no conference is scheduled, five days before trial. Plaintiffs shall submit their portion of the joint pretrial statement to all parties no later than twenty days before the statement is due. All other parties shall submit their portion of the joint pretrial statement to all parties no later than fifteen days before the statement is due.~~

~~(2) The joint pretrial statement shall contain the following:~~

~~(A) Stipulations of material fact and law;~~

~~(B) Such contested issues of fact and law as counsel can agree are material or applicable;~~

~~(C) A separate statement by each party of other issues of fact and law believed by that party to be material;~~

~~(D) A list of witnesses intended to be used by each party during trial. Each party shall list any objections to a witness and the basis for that objection. No witness shall be used at the trial other than those listed, except for good cause shown. Witnesses whose testimony will be received by deposition testimony only will be so indicated;~~

~~(E) Each party's final list of exhibits to be used at trial for any purpose, including impeachment. Plaintiffs shall deliver copies of all of their exhibits to all parties twenty days before the final pretrial conference. All other parties shall deliver copies of all their exhibits to all parties fifteen days before the final pretrial conference. Any exhibit that cannot be reproduced must be made available for inspection to all parties on or before~~

~~the deadlines stated above. Each party shall list any objections to an exhibit and the basis for that objection. No exhibit shall be used at the trial other than those listed, except for good cause shown. The parties shall indicate any exhibits which the parties stipulate can be admitted into evidence, such stipulations being subject to court approval;~~

~~(F) A statement by each party indicating any proposed deposition summaries or designating portions of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. Deposition testimony shall be designated by transcript page and line numbers. A copy of any proposed deposition summary and written transcript of designated deposition testimony should be filed with the Joint Pretrial Statement. Each party shall list any objections to the proposed deposition summaries and designated deposition testimony and the basis for any objections. Except for good cause shown, no deposition testimony shall be used at trial other than that designated or counter designated or for impeachment purposes;~~

~~(G) A brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party shall submit a separate statement to the judge who will decide the contents of the statement to be read to the jury;~~

~~(H) Technical equipment needed or interpreters requested;~~

~~(I) The number of jurors and alternates agreed upon, whether the alternates may deliberate, and the number of jurors required to reach a verdict;~~

~~(J) Whether any party will be invoking Rule 615 of the Arizona Rules of Evidence regarding exclusion of witnesses from the courtroom; and~~

~~(K) A brief description of settlement efforts.~~

~~(3) At the time of the filing of the joint pretrial statement, the parties shall file (A) an agreed upon set of jury instructions, verdict forms, and voir dire questions and (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed upon (C) a statement by each party on how a verbatim record of the trial will be made.~~

~~(4) Each party intending to submit a jury notebook to the jurors shall submit a copy of the notebook to opposing counsel five days before the final pretrial conference, or if no conference is scheduled, five days before the trial.~~

~~(5) Each party who will be submitting a trial memorandum shall file such memorandum five days before the final pretrial conference, or if no conference is scheduled, five days before the trial.~~

~~(6) Any final pretrial conference scheduled by the court shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one~~

~~of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.~~

~~(7) The provisions of this rule may be modified by order of the court.~~

~~**Rule 16(e). Pretrial Orders**~~

~~After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.~~

Rule 16(f). Trial-Setting Conference

(1) If the Court has not already set a trial date in a Scheduling Order or otherwise, the court shall hold a Trial-Setting Conference, as set by the Scheduling Order, for the purpose of setting a trial date. The conference shall be attended in person or telephonically (as permitted by the court) by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(2) In addition to setting a trial date, the court may discuss at the Trial-Setting Conference:

(A) The status of discovery and any dispositive motions that have been or will be filed.

(B) A date for holding a Trial Management Conference under Rule 16(g).

(C) The imposition of time limits on trial proceedings or portions thereof.

(D) The use of juror questionnaires.

(E) The use of juror notebooks.

(F) The giving of brief pre-voir dire opening statements and preliminary jury instructions.

(G) The effective management of documents and exhibits.

(H) Such other matters as the court deems appropriate.

(3) If for any reason a trial date is not set at the Trial-Setting Conference, the court shall schedule another Trial-Setting Conference as soon as practicable for the setting of a trial date.

Rule 16(g). Joint Pretrial Statement: Preparation; ~~Final Pretrial~~ Trial Management Conference

(1) Counsel or the unrepresented parties who will try the case and who are authorized to make binding stipulations shall confer and prepare a written joint pretrial statement, signed by each counsel or party, that shall be filed ~~five~~ ten days before the date of the ~~final pretrial~~ Trial Management Ceonference, or if no conference is scheduled, ~~five~~ ten days before trial. Plaintiffs shall submit their portion of the Jjoint Ppretrial Sstatement to all parties no later than twenty days before the statement is due. All other parties shall submit their portion of the Jjoint Ppretrial Sstatement to all parties no later than fifteen days before the statement is due.

(2) The Jjoint Ppretrial Sstatement shall be prepared by the parties as a single document and contain the following:

(A) Stipulations of material fact and law;

(B) Such contested issues of fact and law as counsel can agree are material or applicable;

(C) A separate statement by each party of other issues of fact and law believed by that party to be material;

(D) A list of witnesses intended to be used by each party during trial. Each party shall list any objections to a witness and the basis for that objection. No witness shall be used at the trial other than those listed, except for good cause shown. Witnesses whose testimony will be received by deposition testimony only will be so indicated;

(E) Each party's final list of exhibits to be used at trial for any purpose, including impeachment. Plaintiffs shall deliver copies of all of their exhibits to all parties twenty days before the ~~final pretrial~~ Trial Management Ceonference. All other parties shall deliver copies of all their exhibits to all parties fifteen days before the ~~final pretrial~~ Trial Management Ceonference. Any exhibit that cannot be reproduced must be made available for inspection to all parties on or before the deadlines stated above. Each party shall list any objections to an exhibit and the basis for that objection. No exhibit shall be used at the trial other than those listed, except for good cause shown. The parties shall indicate any exhibits which the parties stipulate can be admitted into evidence, such stipulations being subject to court approval;

(F) A statement by each party indicating any proposed deposition summaries or designating portions of any deposition testimony to be offered by that party at trial, other than for impeachment purposes. Deposition testimony shall be designated by transcript page and line numbers. A copy of any proposed deposition summary and written

transcript of designated deposition testimony should be filed with the Joint Pretrial Statement. Each party shall list any objections to the proposed deposition summaries and designated deposition testimony and the basis for any objections. Except for good cause shown, no deposition testimony shall be used at trial other than that designated or counter-designated or for impeachment purposes;

(G) A brief statement of the case to be read to the jury during voir dire. If the parties cannot agree on this statement, then each party shall submit a separate statement to the judge who will decide the contents of the statement to be read to the jury;

(H) Technical equipment needed or interpreters requested;

(I) The number of jurors and alternates agreed upon, whether the alternates may deliberate, and the number of jurors required to reach a verdict;

(J) Whether any party will be invoking Rule 615 of the Arizona Rules of Evidence regarding exclusion of witnesses from the courtroom; and

(K) A brief description of settlement efforts.

(3) At the time of the filing of the Jjoint Ppretrial Sstatement, the parties shall file (A) an agreed-upon set of jury instructions, verdict forms, and voir dire questions, (B) any additional jury instructions, verdict forms, and voir dire questions requested, but not agreed upon, and (C) a statement by each party on how a verbatim record of the trial will be made.

(4) A party intending to submit a jury notebook to the jurors shall serve a copy of the notebook on the other parties five days before the ~~final pretrial~~ Trial Management Ceonference, or, if no conference is scheduled, five days before the trial.

(5) Any trial memoranda shall be filed five days before the ~~final pretrial~~ Trial Management Ceonference, or, if no conference is scheduled, five days before the trial.

(6) Any ~~final pretrial~~ Trial Management Ceonference scheduled by the court shall be held as close to the time of trial as reasonable under the circumstances. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(7) The provisions of this rule may be modified by order of the court.

Rule 16(h). Pretrial Orders

After any conference held pursuant to this Rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a

subsequent order. The order following a ~~final pretrial~~ Trial Management Ceonference under Rule 16(g~~f~~) shall be modified only to prevent manifest injustice.

Rule 16~~(f)~~(i). Sanctions

If a party or attorney fails to obey a scheduling or pretrial order or fails to meet the discovery, disclosure and other deadlines set forth therein, or if no appearance is made on behalf of a party at a Sscheduling or ~~pretrial~~ Trial Management Ceonference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith in a Sscheduling or ~~pretrial~~ Trial Management Ceonference or in the preparation of the Joint Report and Proposed Scheduling Order or Jjoint Ppretrial Sstatement, the judge, upon motion or the judge's own initiative, shall, except upon a showing of good cause, make such orders with regard to such conduct as are just, including, among others, any of the orders provided in Rule 37(b)(2)(B), (C), or (D). The fact that a trial date has not been set does not preclude sanctions under this Rule, including the exclusion from evidence of untimely disclosed information. In lieu of or in addition to any other sanction, the judge shall require the party, or the attorney representing the party, or both, to pay the reasonable expenses incurred ~~because~~ as the result of any noncompliance with this ~~rule~~Rule, including attorneys' fees, or payment of an assessment to the clerk of the court, or both, unless the judge finds that the noncompliance was substantially justified, or that other circumstances make an award of expenses unjust

Rule ~~16(g~~16(j). Alternative Dispute Resolution

~~(1)~~ Upon motion of any party, or upon its own initiative after consultation with the parties, the court may direct the parties in any action to submit the dispute which is the subject matter of the action to an alternative dispute resolution program created or authorized by appropriate local court rules.

Rule ~~16(h~~16(k). Time Limitations

The court may impose reasonable time limits on the trial proceedings or portions thereof.

Rule 16.1 Settlement Conferences: Objectives

(a) Mandatory Settlement Conferences. Except ~~as to~~ in appeals from a lower court ~~appeals~~, medical malpractice cases, and cases subject to compulsory arbitration under ~~A.R.S. § 12-133, in any action in which a motion to set and certificate of readiness is filed, the court~~ Rule 72(b), at the request of any party, ~~the court shall, except for good cause shown,~~ may direct the parties, the attorneys for the parties and, if appropriate, representatives of the parties having authority to settle, to participate either in person or, with leave of court, by telephone, in a conference or conferences before trial for the purpose of facilitating settlement. Unless

otherwise ordered by the court, all requests for settlement conferences shall be made not later than 60 days prior to trial. The court may also schedule a settlement conference upon its own motion.

In medical malpractice cases, the court shall conduct a mandatory settlement conference no earlier than four (4) months after the ~~conduct of the comprehensive pretrial~~ Rule 16(e) conference and no later than thirty (30) days before trial.

Rule 26. General provisions governing discovery

. . .

Rule 26(b). Discovery Scope and Limits

. . .

(5) *Non-party at Fault.* Any party who alleges, pursuant to A.R.S. § 12-2506(B) ~~(as amended)~~, that a person or entity not currently or formerly named as a party was wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action shall provide the identity, location, and the facts supporting the claimed liability of such ~~nonparty at the time of compliance with the requirements of Rule 38.1(b)(2) of these Rules, or~~ non-party within one hundred fifty (150) days after the filing of that party's answer~~, whichever is earlier~~. The trier of fact shall not be permitted to allocate or apportion any percentage of fault to any ~~nonparty~~ non-party whose identity is not disclosed in accordance with the requirements of this ~~subpart 5~~ subsection except upon written agreement of the parties or upon motion establishing good cause, reasonable diligence, and lack of unfair prejudice to other parties.

. . .

Rule 37. Failure to make disclosure or discovery; Sanctions

. . .

Rule 37(c). Failure to Disclose; False or Misleading Disclosure; Untimely Disclosure

. . .

(2) A party seeking to use information which that party first disclosed later than (A) the deadline set in a Scheduling Order, or (B) in the absence of such a deadline, sixty (60) days before trial, must obtain leave of court by motion, supported by affidavit, to extend the time for disclosure. Such information shall not be used unless the motion establishes and the court finds:

(i) that the information would be allowed under the standards of subsection (c)(1) ~~notwithstanding the short time remaining before trial~~; and

(ii) that the information was disclosed as soon as practicable after its discovery.

Rule 38. Right to a Jury Trial ~~of Right~~; Demand; Waiver

Rule 38(a). Right preserved

The right of trial by jury shall be preserved inviolate to the parties.

Rule 38(b). Demand

Any person may demand a trial by jury of any issue triable of right by jury. The demand may be made by any party by filing and serving ~~upon the other party~~ a demand therefor in writing at any time after the commencement of the action, but not later than the date ~~of setting~~ on which the ~~case for~~ court sets a trial date or ten days after ~~a motion to set the case for trial is served~~ the date a Joint Report and Proposed Scheduling Order under Rule 16(b) or Rule 16.3 are filed, whichever first occurs. The demand for trial by jury ~~may be endorsed on or be combined with the motion to set, but~~ shall not be endorsed on or be combined with any other motion or pleading filed with the court.

Rule 38(c). Demand; specification of issues

In the demand, a party may specify the issues which the party wishes ~~so~~ to have tried~~,~~ by a jury; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party may, within ten days after service of the demand or such lesser time as the court may order, ~~may~~ serve a demand for trial by jury of any other or all ~~the~~ issues of fact in the action triable by jury.

Rule 38(d). Waiver

~~The failure of a party to serve a demand as required by this Rule and to file it as required by Rule 5(b) constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.~~

A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

Rule 38.1. Setting of Civil Cases for Trial; Postponements; Scheduling Conflicts; Dismissal Calendar

~~(a)**Motion to Set and Certificate of Readiness; Identification of Nonparty at Fault.** In every civil case, counsel for plaintiff shall, or counsel for any other party may, file a Motion to Set and Certificate of Readiness. Service shall be in the manner prescribed by Rule 5 of these Rules. The form and contents of the Certificate of Readiness shall be as follows:~~

~~The undersigned attorney hereby certifies:~~

~~(1) That the issues in the above captioned case have actually been joined;~~

~~(2) The largest award sought by any party, including punitive damages, but excluding interest, attorneys' fees, and costs, is $_____ This case [is] [is not] subject to the mandatory arbitration provisions of Rules 72 through 76 of these Rules.~~

~~(3) That the status of discovery is as follows:~~

~~(i) In a court which requires such certification by local rule, the parties have completed, or will have had a reasonable opportunity to complete, the procedures under Rules 26 to 37 of these Rules within 60 days after the filing of the Certificate of Readiness; or~~

~~(ii) In a court which requires such certification by local rule, the parties have completed, or have had a reasonable opportunity to complete, the procedures under Rules 26 to 37 of these Rules at the time of filing of the Certificate of Readiness; or~~

~~(iii) In all other cases, the parties have completed, or will have had a reasonable opportunity to complete, the procedures under Rules 26 to 37 of these Rules prior to ten days before trial.~~

~~(4) That this case will be ready for trial on or after [DATE].~~

~~(5) That a trial by jury is [not] demanded (strike out the word "not" if a jury trial is demanded);~~

~~(6) That this cause may [not] be heard as a short cause within one hour [strike out the word "not" if the time required for trial will not exceed one hour];~~

~~(7) That the names, addresses and telephone numbers of the parties or their individual attorneys who are responsible for the conduct of the litigation are: [insert the appropriate information]; and~~

(8) That this cause is entitled to a preference for trial by reason of the following statute or rule: [insert statutory section or rule number if a preference is applicable].

_____

Signature of Attorney

If the Motion to Set and Certificate of Readiness is filed by a defending party in a court which does not require the certification set forth in (a)(3)(i) or (ii) of this Rule, then the Certificate of Readiness shall also identify any nonparty who is alleged, pursuant to A.R.S. § 12-2506(B) (as amended), to be wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action.

(b) Controverting Certificate; Identification of Nonparty at Fault. Within ten days after a Motion to Set and Certificate of Readiness has been served:

(1) Counsel for any other party may file a Controverting Certificate which specifies the particular statements contained in the Certificate of Readiness to which objection is made, and the reasons therefor.

(2) In those courts which do not require the certification set forth in either subpart (a)(3)(i) or (ii) of this Rule, counsel for a defending party must, in a Controverting Certificate or separately, identify any nonparty who is alleged, pursuant to A.R.S. § 12-2506(B) (as amended), to be wholly or partially at fault in causing any personal injury, property damage or wrongful death for which damages are sought in the action.

The court shall thereupon enter an order, without oral argument, placing the case on the Active Calendar either immediately or, where good cause is shown, at a specified later date. No case shall be heard as a short cause if objection is made thereto in the Controverting Certificate.

(c) Active Calendar. Ten days after a Motion to Set and Certificate of Readiness has been served, if a Controverting Certificate has not been served, or otherwise by order of the court, the clerk of the court or court administrator shall place the case on the Active Calendar and shall stamp thereon a chronological list number which shall generally govern the priority of the case for trial, except as to those cases which are entitled to preference by statute or local rule, and except that short causes may be preferred for trial in accordance with local rules.

(d) Inactive Calendar. The clerk of the court or court administrator shall place on the Inactive Calendar every case in which a Motion to Set and Certificate of Readiness has not been served within nine months after the commencement thereof. All cases remaining on the Inactive Calendar for two months shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such two months period:

~~(1) a proper Motion to Set and Certificate of Readiness is served;~~

~~(2) the court, on motion for good cause shown, orders the case to be continued on the Inactive Calendar for a specified period of time without dismissal; or~~

~~(3) a notice of decision has been filed with the clerk of court in a case assigned to arbitration.~~

~~**(e) Notification**. The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify counsel in writing of the placing of cases on the Inactive Calendar, and no further notice shall be required prior to dismissal.~~

~~**(f) Additional Discovery**. In those cases in which the certification set forth in subpart (a)(3)(i) is required by local rule, all pretrial procedures under Rules 26 to 37 of these Rules shall be completed within 60 days after service of the Motion to Set and Certificate of Readiness. In those cases in which the certification set forth in subpart (a)(3)(ii) is required by local rule, all pretrial procedures under Rules 26 to 37 of these Rules shall be completed at the time of service of the Motion to Set and Certificate of Readiness. In all other cases, all pretrial procedures under Rules 26 to 37 of these Rules shall be completed prior to ten days before trial. Notwithstanding the foregoing, for good cause shown, the court may permit or the parties may stipulate that additional discovery procedures may be undertaken anytime prior to trial.~~

~~**(g)Setting for Trial**. Cases on the Active Calendar~~ **Rule 38.1(a). Setting for Trial**

Civil actions shall be set for trial ~~as soon as possible~~ pursuant to Rule 16 or Rule 77. Preference shall be given to short causes and cases ~~which~~ that by reason of statute, rule or court order are entitled to priority. ~~Counsel~~ The parties shall be given at least thirty days notice of the trial date.

Rule 38.1(~~h~~b). Postponements

Unless otherwise provided by local rule, when an action has been set for trial on a specified date by order of the court, no postponement of the trial shall be granted except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law.

Rule 38.1(~~i~~)(c). Application for Postponement; Grounds; Effect of Admission of Truth of Affidavit by Adverse Party

On an application for a postponement of the trial, if the ground for the application is the want of testimony, the party applying therefor shall ~~make~~ provide an affidavit ~~that such testimony is material~~ showing the materiality ~~thereof,~~ of the testimony and that

the party has used due diligence to procure such testimony, stating such diligence and the cause of failure to procure such testimony, if known, and that such testimony cannot be obtained from any other source. If the ground for the application is the absence of a witness, the party applying shall state the name and residence of the witness, and what the party expects to prove by the witness. The application in either case shall also state that the postponement is not sought for delay only, but that justice may be done. If the adverse party admits that such testimony would be given and that it will be considered as actually given ~~on~~ at the trial, or offered and overruled as improper, the trial shall not be postponed. Such testimony may be controverted as if the witness were personally present.

Rule 38.1(jd). Deposition of Witness or Party; Consent

The party obtaining a postponement shall, if required by the adverse party, consent that the testimony of any witness or adverse party in attendance be taken by deposition~~, without notice~~. The testimony so taken may be read ~~on~~ at the trial by either party as if the witnesses were present.

Rule 38.1(ke). Scheduling conflicts between courts

(1) *Notice to the court.* Upon learning of a scheduling conflict between a case in Superior Court and a case in United States District Court, or between cases in the Superior Courts of different counties, or between cases in different courts within a county, counsel ~~has a duty to~~ shall promptly notify the judges and other counsel involved in order that the conflict may be resolved.

(2) *Resolution of conflicts.* Upon being advised of a scheduling conflict, the judges involved shall, if necessary, confer personally or by telephone in an effort to resolve the conflict. While neither federal nor state court cases have priority in scheduling, the following factors may be considered in resolving the conflict:

(A) the nature of the cases as civil or criminal, and the presence of any speedy trial problems;

(B) the length, urgency, or relative importance of the matters;

(C) a case which involves out-of-town witnesses, parties or counsel;

(D) the age of the cases;

(E) the matter which was set first;

(F) any priority granted by rule or statute; and

(G) any other pertinent factor.

(3) *Inter-division Conflicts.* Conflicts in scheduling between divisions of the same court may be governed by local rule or general order.

Rule 38.1(f). Dismissal Calendar

The clerk of the court or court administration shall place on the Dismissal Calendar every civil action in which a Joint Report and a Proposed Scheduling Order under Rule 16 or Rule 16.3 or an arbitrator's notice of decision under Rule 76 have not been filed with the court within 270 days after the commencement thereof, or in medical malpractice cases where the court has not set a Comprehensive Pretrial Conference within 270 days after the commencement thereof. A case remaining on the Dismissal Calendar for 60 days shall be dismissed without prejudice for lack of prosecution, and the court shall make an appropriate order as to any bond or other security filed therein, unless prior to the expiration of such 60-day period:

(1) a Joint Report and a Proposed Scheduling Order under Rule 16(b) or Rule 16.3 are filed with the court;

(2) in medical malpractice cases, the court sets a Comprehensive Pretrial Conference;

(3) the court, on motion for good cause shown, orders the case to be continued on the Dismissal Calendar for a specified period of time without dismissal; or

(4) a notice of decision has been filed with the clerk of the court in a case assigned to arbitration.

Rule 38.1(g) Notification

The clerk of the court or court administrator, whoever is designated by the presiding judge, shall promptly notify counsel in writing when a case is placed on the Dismissal Calendar, and no further notice shall be required prior to dismissal.

Rule 72. Compulsory Arbitration; Arbitration by Reference; Alternative Dispute Resolution; Determination of Suitability for Arbitration

. . .

(d) Alternative Dispute Resolution.

(1) Compulsory arbitration under A.R.S. § 12-133 and these rules is not binding. Any party may appeal and all appeals are *de novo* on the law and facts. Therefore, before a hearing in accordance with Rule 75 of these rules is held, counsel for the parties, or the parties if not represented by counsel, shall confer regarding the feasibility of resolving their dispute through another form of alternative dispute resolution, including but not limited to private mediation or binding arbitration with a mediator or arbitrator agreed to by the parties.

(2) The court shall waive the arbitration requirement if the parties file a written stipulation to participate in good faith in an alternative dispute resolution proceeding, and the court approves the method selected by the parties. The stipulation shall identify the specific alternative dispute resolution method selected. The court may waive the arbitration requirement for other good cause upon stipulation of all parties. If the alternative dispute resolution method selected under this Rule fails, the case shall be set for trial in accordance with Rule ~~38.1~~ 16 of these Rules and shall not be subject to the rules governing compulsory arbitration.

Rule 73. Appointment of Arbitrators

(a) Lawyer or Non-Lawyer Arbitrators. The parties, by written stipulation and by written consent of the proposed arbitrator filed with the clerk~~Clerk~~ of the ~~Superior Court~~ court with conformed copies to the ~~Superior Court Administrator~~ court administrator, may agree that the case be assigned to a single lawyer or non-lawyer arbitrator named in the stipulation. All other cases subject to arbitration shall be heard by an arbitrator selected as provided below.

(b) List of Arbitrators. Except as the parties may stipulate under the provisions of ~~subdivision~~ section (a) of this ~~r~~Rule, the arbitrator shall be appointed by the ~~Court Administrator or Superior Court Clerk~~ clerk of the court or court administrator from a list of persons, as provided by local rule, which shall include the following:

(1) all residents of the county in which the court is located who, for at least four years, have been active members of the State Bar of Arizona.

(2) other active and inactive members of the State Bar of Arizona residing anywhere in Arizona, and members of any other federal court or state bar, who have agreed to serve as arbitrators in the county where the ~~action~~ court is ~~pending~~ located.

(c) Appointment of Arbitrators; Timing of ~~Assignment~~ Appointment; Notice of Appointment; Right to Peremptory Strike

(1) *Appointment of arbitrator from list.* The ~~Superior Court Administrator or Superior Court Clerk~~ clerk of the court or court administrator, under the supervision of the ~~Presiding Judge~~ presiding judge or that judge's designee, shall prepare a list of arbitrators who may be designated ~~as to the~~ by their area of concentration, specialty or expertise. ~~By means of a method of selecting names at random from the list of arbitrators, the Superior Court Administrator or Superior Court Clerk shall~~ The clerk of the court or court administrator shall randomly select and then assign to each case one ~~name~~ arbitrator from the list ~~of arbitrators~~.

~~(2) Timing of assignment. Assignment to arbitration shall take place as soon as is feasible after the answer and controverting certificate are filed and in any event no later than 120 days thereafter.~~

(2) *Timing of appointment.* Appointment of an arbitrator to a case shall occur no later than 120 days after an answer is filed.

(3) *Notice of appointment of arbitrator.* The ~~Superior Court Administrator or Superior Court Clerk~~ clerk of the court or court administrator shall promptly ~~notify the parties of the name~~ mail written notice of the arbitrator ~~by mailing written notice~~ selected to the parties and the arbitrator. The written notice ~~from the Superior Court Administrator or Superior Court Clerk~~ shall advise the parties that the time periods specified in Rule 38.1(f) of these Rules for placing a case on the ~~inactive calendar in Rule 38.1(d) of these rules~~ Dismissal Calendar shall apply.

(4) *Right to peremptory strike.* Within ten days after the mailing of ~~such~~ the notice of appointment of arbitrator, or within ten days after the appearance of a party if the arbitrator was appointed before that party appeared, either side may peremptorily strike the assigned arbitrator and request that a new arbitrator be appointed. Each side shall have the right to only one peremptory strike in any one case. A motion for recusal or motion to strike for cause shall toll the time to exercise a peremptory strike.

(d) Disqualifications and Excuses.

(1) Upon written motion and a finding of good cause therefore, the ~~Presiding Judge~~ presiding judge or that judge's designee may excuse a lawyer from the list of arbitrators.

(2) An arbitrator, after ~~selection~~ appointment, may be disqualified from serving in a particular assigned case upon motion of either party to the judge assigned to the case, for an ethical conflict of interest or other good cause shown as defined in A.R.S. §§ 12-409 or 21-211, submitted in accord with the procedure set out in Rule 42(f)(2) of these Rules.

(3) An arbitrator may be excused by the presiding judge or that judge's designee from serving in a particular assigned case upon a showing by the arbitrator that such individual has

completed contested hearings and ruled as an arbitrator pursuant to these Rules in two or more cases assigned during the current calendar year ~~or~~ and shall be excused on a detailed showing that such individual has an ethical conflict of interest or other good cause shown as defined in A.R.S. §§ 12-409 or 21-211, submitted in accord with the procedure set out in Rule 42(f)(2) of these Rules.

(4) After an arbitrator has been disqualified or excused from a particular case under ~~these rules~~ this section (d), a new arbitrator shall be appointed in accordance with the procedure set forth in ~~subdivision~~ section (c) of this Rule.

Rule 74. Powers of Arbitrator; Scheduling of Arbitration Hearing; Permitted Rulings by Arbitrator; Time for Filing Summary Judgment Motion; Receipt of Court File; Settlement of Cases; Offer of Judgment

. . .

(c) Rulings by Arbitrator.

(1) *Authorized rulings*. After a case has been assigned to an arbitrator, the arbitrator shall make all legal rulings, including rulings on motions, except:

(A) motions to continue on the ~~inactive calendar~~ Dismissal Calendar or otherwise extend time allowed under Rule 38.1 of these ~~rules~~ Rules;

(B) motions to consolidate cases under Rule 42 of these ~~rules~~ Rules;

(C) motions to dismiss;

(D) motions to withdraw as attorney of record under Rule 5.1 of these ~~rules~~Rules; or

(E) motions for summary judgment that, if granted, would dispose of the entire case as to any party~~; or~~.

~~(F) motions for sanctions under Rule 68 of these rules.~~

Rule 77. Right of Appeal

(a) **Notice of Appeal.** Any party who appears and participates in the arbitration proceedings may appeal from the award or other final disposition by filing a notice of appeal with the ~~Clerk~~ clerk of the ~~Superior Court~~ court within 20 days after the ~~filing of the~~ award is filed or 20 days after the date upon which the notice of decision becomes an award under Rule 76(b), whichever occurs first. The notice of appeal shall be entitled "Appeal from Arbitration and Motion to Set for Trial" and shall request that the case be set for trial in the Superior Court and state whether a jury trial is requested and the estimated length of trial. ~~The Appeal from Arbitration and Motion to Set for Trial shall serve in place of a Motion to Set and Certificate of Readiness under Rule 38.1(a) of these rules.~~

(b) **Deposit on Appeal.** At the time of filing the notice of appeal, and as a condition of filing, the appellant shall deposit with the ~~Clerk~~ clerk of the ~~Superior Court~~ court a sum equal to one hearing day's compensation of the arbitrator, but not exceeding ten percent of the amount in controversy. If the court finds that the appellant is unable to make such deposit by reason of lack of funds, the court shall allow the filing of the appeal without deposit.

ATTACHMENT B

Form 11(a) – Joint Report: Expedited Case

In the Superior Court of Arizona

_____ County

Plaintiffs	)	Case number _____
v	)	**Joint Report**
	)	*(Expedited case)*
Defendants	)	
	)	Assigned to:

The parties signing below certify that they have conferred about the matters contained in Rule 16(d), and they further certify that:

(a) Every defendant has been served or dismissed, and every defendant who has not been defaulted has filed a responsive pleading;
(b) There are no third party claims;
(c) This case is not subject to the mandatory arbitration provisions of Rule 72; and
(d) The parties will disclose no more than one expert per side, and each party will call no more than four lay witnesses at trial.

With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 12 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. ***Brief description of the case:*** _____
_____
_____.
   - If a claimant is seeking other than monetary damages, specify the relief sought: _____
_____.

2. ***Settlement:*** The parties agree to engage in settlement discussions with [] a settlement judge assigned by the court, or [] a private mediator.
   - The parties will be ready for a settlement conference or a private mediation by _____.
   - If the parties will not engage in a settlement conference or a private mediation, state the reason(s): _____.

3. ***Readiness:*** This case will be ready for trial by _____.

4. ***Jury:*** A trial by jury is demanded. [] yes [] no

5. ***Length of trial:*** The estimated length of trial is ____ days.

6. ***Summary jury:*** The parties agree to a summary jury trial. [] yes [] no

7. ***Short cause:*** A non-jury trial will not exceed one hour. [] yes [] no

8. ***Preference:*** This case is entitled to preference for trial under this statute or rule: _____
_____.

9. ***Special requirements:*** [] At a pretrial conference or [] at trial, a party will require
[] disability accommodations (specify) _____

[] an interpreter (specify language) _____

10. Scheduling conference: The parties request a Rule 16(d) scheduling conference. [] yes [] no
If requested, the reasons for having a conference are: _____

_____.

10. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case: _____
_____.

11. Items upon which the parties do not agree: The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:
_____
_____.

Dated this ____ day of _____, 20____.

_____ _____
For Plaintiff For Defendant

Form 11(b) – Proposed Scheduling Order: Expedited Case

In the Superior Court of Arizona

_____ County

Plaintiffs	)	Case number _____
v	)	**Proposed Scheduling Order**
	)	*(Expedited case)*
Defendants	)	
	)	Assigned to:

Upon consideration of the parties' Joint Report, the court orders as follows:

1. ***Initial disclosure:*** The parties have provided their initial disclosure statements, or will provide them no later than _____.

2. ***Witness disclosure:*** The parties will disclose no more than one expert per side, and each party will call no more than four lay witnesses at trial. The parties will disclose lay witnesses by _____. The parties will identify any expert witnesses and the experts' areas of testimony, and will simultaneously disclose the opinions of those expert witnesses, by _____. (Alternative: Plaintiff will disclose an expert's identity, area of testimony, and opinions by_____, and Defendant will disclose an expert's

identity, area of testimony, and opinions by_____.) The parties will simultaneously disclose the experts' rebuttal opinions

3. ***Final supplemental disclosure:*** Each party shall provide final supplemental disclosure by _____. This order does not replace the parties' obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial if not disclosed in a timely manner, except for good cause shown or upon a written or an on-the-record agreement of the parties.

4. ***Discovery deadlines:*** The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by _____. The parties will complete the depositions of parties and lay witnesses by _____, and will complete the depositions of expert witnesses by _____. The parties will complete all other discovery by _____. ("Complete discovery" includes conclusion of all depositions and submission of full and final responses to written discovery.)

5. ***Settlement conference or private mediation:*** [choose one]:

[] **Referral to ADR for a settlement conference:** The clerk or the court will issue a referral to ADR by a separate minute entry.

[] **Private mediation:** The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by _____.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

[] **No settlement conference or mediation:** A settlement conference or private mediation is not ordered.

6. ***Dispositive motions:*** The parties shall file all dispositive motions by _____.

7. ***Trial setting conference:*** On _____ [the court will provide this date], the court will conduct a telephonic trial setting conference. Participants shall have their calendars available for the conference.

   [] Plaintiff [] Defendant will initiate the conference call by arranging for the presence of all other attorneys and self-represented parties, and by calling this division at _____ [division's telephone number] at the scheduled time.

8. ***Firm dates:*** No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

9. ***Further orders:*** The court further orders as follows: _____
   _____.

_____ _____
Date Judge of the Superior Court

Form 12(a) – Joint Report: Standard Case

In the Superior Court of Arizona

_____ County

Plaintiffs	)	Case number _____
v	)	**Joint Report**
	)	*(Standard case)*
Defendants	)	
	)	Assigned to:

The parties signing below certify that they have conferred about the matters set forth in Rule 16(d), and that this case is not subject to the mandatory arbitration provisions of Rule 72. With regard to matters upon which the parties could not agree, they have set forth their positions separately in item 14 below. The parties are submitting a Proposed Scheduling Order with this Joint Report. Each date in the Joint Report and in the Proposed Scheduling Order includes a calendar month, day, and year.

1. ***Brief description of the case:*** _____
_____
_____

- If a claimant is seeking other than monetary damages, specify the relief sought _____
_____.

2. ***Current case status:*** Every defendant has been served or dismissed. [] yes [] no
   - Every party who has not been defaulted has filed a responsive pleading. [] yes [] no
   - Explanation of a "no" response to either of the above statements: _____
     _____.

3. ***Amendments:*** A party anticipates filing an amendment to a pleading that will add a new party to the case: [] yes [] no

4. ***Special case management:*** Special case management procedures are appropriate: [] yes [] no
   If "yes," the following case management procedures are appropriate because: _____

   _____.

5. ***Settlement:*** The parties agree to engage in settlement discussions with [] a settlement judge assigned by the court, or [] a private mediator.

   The parties will be ready for a settlement conference or a private mediation by _____.

   If the parties will not engage in a settlement conference or a private mediation, state the reason(s): _____.

6. ***Readiness:*** This case will be ready for trial by _____.

7. ***Jury:*** A trial by jury is demanded. [] yes [] no

8. ***Length of trial:*** The estimated length of trial is ____ days.

9. ***Summary jury:*** The parties agree to a summary jury trial. [] yes [] no

10. ***Preference:*** This case is entitled to a preference for trial pursuant to the following statute or rule: _____.

11. ***Special requirements:*** [] At a pretrial conference or [] at trial, a party will require
    [] disability accommodations (specify) _____

    [] an interpreter (specify language) _____

12. Scheduling conference: The parties request a Rule 16(d) scheduling conference. [] yes [] no
If requested, the reasons for having a conference are _____

_____.

13. Other matters: Other matters that the parties wish to bring to the court's attention that may affect management of this case: _____

_____.

14. Items upon which the parties do not agree: The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:

_____

_____.

Dated this ____ day of _____, 20____.

_____ _____

For Plaintiff For Defendant

Form 12(b) – Proposed Scheduling Order: Standard Case

In the Superior Court of Arizona

_____ County

Plaintiffs	)	Case number _____
v	)	**Proposed Scheduling Order**
	)	*(Standard case)*
Defendants	)	
	)	Assigned to:

Upon consideration of the parties' Joint Report, the court orders as follows:

1. ***Initial disclosure:*** The parties have exchanged their initial disclosure statements, or will exchange them no later than _____.

2. ***Expert witness disclosure:*** The parties shall simultaneously disclose areas of expert testimony by _____. (Alternative: Plaintiff shall disclose areas of expert testimony by _____, and Defendant shall disclose areas of expert testimony by_____.)

The parties shall simultaneously disclose the identity and opinions of experts by _____. (Alternative: Plaintiff shall disclose the identity and opinions of experts by _____, and Defendant shall disclose the identity and opinions of experts by_____.)

The parties shall simultaneously disclose their rebuttal expert opinions by _____.

3. ***Lay (non-expert) witness disclosure:*** The parties shall disclose all lay witnesses by _____. (Alternative: The parties shall disclose lay witnesses in the following order, and by the following dates: _____.)

4. ***Final supplemental disclosure:*** Each party shall provide final supplemental disclosure by _____. This order does not replace the parties' obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available.

No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.

5. ***Discovery deadlines:*** The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by _____. The parties will complete the depositions of parties and lay witnesses by _____, and will complete the depositions of expert witnesses by _____. The parties will complete all other discovery by _____. ("Complete discovery" includes conclusion of all depositions and submission of full and final responses to written discovery.)

6. ***Settlement conference or private mediation:*** [choose one]:

   [] **Referral to ADR for a settlement conference:** The clerk or the court will issue a referral to ADR by a separate minute entry.

   [] **Private mediation:** The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by _____.

All attorneys and their clients, all self-represented parties, and any non-attorney representatives who have full and complete authority to settle this case shall personally appear and participate in good faith in this mediation, even if no settlement is expected. However, if a non-attorney representative requests a telephonic appearance and the mediator grants the request prior to the mediation date, a non-attorney representative may appear telephonically.

[] **No settlement conference or mediation:** A settlement conference or private mediation is not ordered.

7. ***Dispositive motions:*** The parties shall file all dispositive motions by _____.

8. ***Trial setting conference:*** On _____ [the court will provide this date], the court will conduct a telephonic trial setting conference. Attorneys and self-represented parties shall have their calendars available for the conference.

9. [] Plaintiff [] Defendant will initiate the conference call by arranging for the presence of all other counsel and self-represented parties, and by calling this division at _____ [division's telephone number] at the scheduled time.

10. ***Firm dates:*** No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.

11. ***Further orders:*** The court further orders as follows: _____
_____.

_____ _____
Date Judge of the Superior Court

Form 13(a) – Joint Report: Complex Case

In the Superior Court of Arizona

_____ County

Plaintiffs	)	Case number _____
v	)	**Joint Report**
	)	*(Complex case)*
Defendants	)	
	)	Assigned to:

The parties signing below certify that they have conferred about the following matters. With regard to issues upon which the parties could not agree, they have set forth their positions separately in item 6 below.

1. ***Brief description of the case:***

_____
_____
_____
_____

2. ***Participants:*** The total number of parties (including third parties) in this case is _____:

- Number of counsel appearing: _____
- Number of self-represented litigants appearing: _____

- Number of parties not yet served: _____

3. ***Pleadings:*** This case includes [check if applicable]:

   [] A counterclaim(s)

   [] A cross claim(s)

   [] A third party complaint(s)

   [] A request for class action certification

   [] Consolidated cases

4. ***Complexity:*** This case is complex under the factors specified in Rule 8(i)(2) because:
   _____
   _____
   _____
   _____

5. ***Special considerations:*** The parties request the court to consider at this time the following information concerning management of this case: _____
   _____

6. ***Items upon which the parties do not agree:*** The parties were unable in good faith to agree upon the following items, and the position of each party as to each item is as follows:
   _____
   _____

7. ***Initial case management conference:*** The parties agree that the court may set this matter for an initial case management conference under Rule 16.3. Prior to the conference, the parties will meet and confer, and prepare a second joint report, addressing those items specified in Rules 16(d) and 16.3(a) of the Arizona Rules of Civil Procedure. If the parties cannot agree on an item in the joint report, the report will state the positions of the parties concerning the item at issue. The parties will submit the second joint report to the court at least seven (7) days before the conference date specified above.

Dated this ____ day of _____, 20____.

For Plaintiff	For Defendant
For:	For:

Form 13(b) – Proposed Scheduling Order: Complex Case

In the Superior Court of Arizona

_____ County

	)	
Plaintiffs	)	Case number _____
	)	
v	)	**Proposed Scheduling Order**
	)	*(Complex case)*
Defendants	)	
	)	Assigned to:

Upon consideration of the parties' Joint Report, this court orders as follows:

1. ***Initial case management conference:*** This case is set for an initial case management conference in this division on the ____ day of _____, 20____, at _____ a.m./p.m. [The court will provide the date.]

2. ***Second joint report:*** The parties shall meet and confer, and prepare a second joint report, addressing those items specified in Rules 16(d) and 16.3(a) of the Arizona Rules of Civil Procedure. If the parties cannot agree on an item in the joint report, the report will state the positions of the parties concerning the item at issue. The parties will submit the joint report at least seven (7) days before the conference date specified above.

3. ***Sanctions:*** Any party who does not participate in good faith with the other parties in conferring and in preparing the second joint report, or who does not attend the initial case management conference, shall be subject to sanctions as provided in Rules 16(i) and 16.3(b).

4. Further orders: The court further orders as follows: _____
_____.

_____ _____
Date Judge of the Superior Court

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULES 54 and 58, ARIZONA RULES OF CIVIL PROCEDURE and RULE 9, ARIZONA RULES OF CIVIL APPELLATE PROCEDURE	)	Arizona Supreme Court No. R-13-0005
	)	**FILED 08/28/2013**

ORDER
AMENDING RULES 54 AND 58, RULES OF CIVIL PROCEDURE, AND RULE 9, RULES OF CIVIL APPELLATE PROCEDURE

A petition having been filed proposing to simply the procedures for perfecting an appeal, and no comments having been received, upon consideration,

IT IS ORDERED that Rules 54 and 58, Rules of Civil Procedure, and Rule 9, Rules of Civil Appellate Procedure, be amended in accordance with the attachment hereto, effective January 1, 2014.

DATED this _____ day of August, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

RULES OF CIVIL PROCEDURE

Rule 54(c). Judgment Upon All Claims and Parties

A judgment shall not be final unless the court states that no further matters remain pending and that the judgment is entered pursuant to Rule 54(c).

* * *

Rule 58(a). Service of Form of Judgment; Entry

Proposed forms of judgment shall be served upon all parties and counsel. Except as provided in Rule 54(b), a party seeking attorneys' fees shall provide in the form of judgment for an award of attorneys' fees in an amount to be entered by the court. Except as provided in subsection (f) of this rule, all judgments shall be in writing and signed by a judge or a court commissioner duly authorized to do so. The filing with the clerk of the judgment constitutes entry of such judgment, and the judgment is not effective before such entry, except that in such circumstances and on such notice as justice may require, the court may direct the entry of a judgment nunc pro tunc, and the reasons for such direction shall be entered of record. The entry of the judgment shall not be delayed for taxing costs.

* * *

RULES OF CIVIL APPELLATE PROCEDURE

Rule 9. Appeal—When Taken

(a) [No change in text.]

(b) Extension of Appeal Time.

(1) When any of the following motions are timely filed by any party, the time for appeal for all parties is extended, and the times set forth in Rule 9(a) shall be computed from the entry of any of the following orders:

(~~1~~A) Granting or denying a motion for judgment as a matter of law pursuant to ~~Ariz.Rules Civ. Proc.~~ Arizona Rules of Civil Procedure 50(b);

(~~2~~B) Granting or denying a motion to amend or make additional findings of fact

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* Additions to text are indicated by underscoring and deletions by ~~strikeouts~~.

pursuant to ~~Ariz. Rules Civ. Proc.~~ Arizona Rules of Civil Procedure 52(b) or ~~Ariz. Rules Fam. L. Proc.~~ Arizona Rules of Family Law Procedure 82(B), whether or not granting the motion would alter the judgment.

(~~3~~C) Granting or denying a motion to alter or amend the judgment pursuant to ~~Ariz. Rules Civ. Proc.~~ Arizona Rules of Civil Procedure 59(1) or ~~Ariz. Rules Fam. L. Proc.~~ Arizona Rules of Family Law Procedure 84;

(~~4~~D) Denying a motion for new trial pursuant to ~~Ariz. Rules Civ. Proc.~~ Arizona Rules of Civil Procedure 59(a) or ~~Ariz. Rules Fam. L. Proc.~~ Arizona Rules of Family Law Procedure 83(A).

(2) (A) If more than one of the foregoing motions is timely filed, the expiration of the time for appeal is to be computed from the entry of the order which disposes of the last remaining motion. When a motion to amend or make additional findings of fact is granted, the time does not start to run until the amendment or addition has been accomplished by court order. The same applies also to the granting of a motion to alter or amend the judgment. For the purposes of this subdivision, entry of an order occurs when a signed written order is filed with the clerk of the superior court.

(B) A notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry of the judgment or order. If a notice of appeal is filed before the timely filing of one of the foregoing motions or during the pendency of such a motion, the appellant shall notify the appellate court and the appeal shall be suspended until the motion is decided. The appellant shall notify the appellate court when all such motions have been decided, and the notice of appeal shall be reinstated as of the date of the entry of the order disposing of the last remaining motion. A party intending to appeal a decision made by the lower court after the filing of a notice of appeal must file an amended notice of appeal in compliance with Rule 8 within the time prescribed by this rule measured from the entry of the order disposing of the last such remaining motion.

(c) [No change in text.]

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULES 7.1 AND 56, ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-12-0043
	)	**FILED 08/28/2013**

ORDER
AMENDING RULES 7.1 AND 56, ARIZONA RULES OF CIVIL PROCEDURE

A petition having been filed proposing to amend Rules 7.1 and 56, Arizona Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rules 7.1 and 56, Arizona Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2014.

DATED this _____ day of August, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

Rules of Civil Procedure

Rule 7.1. Civil Motion Practice

(a) – (e) [No change]

(f) Limitations on Motions to Strike.

(1) *Generally.* Unless made at trial or an evidentiary hearing, a motion to strike may be filed only if it is expressly authorized by statute or other rule, or if it seeks to strike any part of a filing or submission on the ground that it is prohibited, or not authorized, by a specific statute, rule, or court order. Unless the motion to strike is expressly authorized by statute or rule: (a) it may not exceed two (2) pages in length, including any supporting memorandum; (b) any responsive memorandum must be filed within five (5) days of service of the motion and may not exceed two (2) pages in length; and (c) no reply memorandum may be filed unless authorized by the court.

(2) *Objections to Admission of Evidence on Written Motions.* Subject to Rule 56(c)(4), governing motions for summary judgment, any objections to, and any arguments regarding the admissibility of, evidence offered in support of or in opposition to a motion must be presented in the objecting party's responsive or reply memorandum and may not be presented in a separate motion to strike or other separate filing. Any response to an objection must be included in the responding party's reply memorandum for the underlying motion and may not be presented in a separate responsive memorandum. If the evidence is offered for the first time in connection with a reply memorandum, the objecting party may file a separate objection limited to addressing the new evidence and not exceeding three (3) pages in length, within five (5) days after service of the reply memorandum. No responsive memorandum may be filed unless authorized by the court.

Rule 56(c). Motion and Proceedings.

(1) – (3) [No change]

* Additions to text are shown by underscoring; deletions by ~~strikeouts~~.

(4) Objections to the admissibility of evidence on motions for summary judgment shall be governed by Rule 7.1(f)(2), except that an objection may be included in a party's response to another party's separate statement of material facts in lieu of (or in addition to) including it in the party's responsive memorandum. Any objection presented in the party's response to the separate statement of material facts must be stated concisely.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 7.1, ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-12-0042
	)	**FILED 08/28/2013**

ORDER
AMENDING RULE 7.1, RULES OF CIVIL PROCEDURE

A petition having been filed proposing to amend Rule 7.1, Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 7.1, Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2014.

DATED this _____ day of August, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

Rules of Civil Procedure

Rule 7.1. Civil Motion Practice

(a) – (f)

(g) **Agreed Extensions of Time for Filing Memoranda**. Subject to the court's power to reject any such agreement, parties may agree to any extension of the dates upon which response and reply memoranda are due when the extension does not otherwise conflict with other scheduling dates set by the court or these Rules. To make an extension effective under this subsection, a notice of the extension to which the parties have agreed must be filed, setting out the dates on which the response or reply briefs shall then be due. The notice shall set forth in its title the number of extensions agreed to with respect to that filing (e.g., First Extension of Time To File Response on Motion To Dismiss). No extension shall be effective without court approval if it purports to make a reply or other final memorandum due less than five days before a hearing or oral argument date previously set by the court, or if the notice of that extension is filed after the memorandum is due. No order is necessary to obtain an extension under this subsection, and the extension shall be effective upon filing, unless and until the court disapproves the change. The provisions of this subsection do not apply to motion practice under Rule 56.

*Additions to text are shown by underscoring; deletions by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of	)	Arizona Supreme Court
	)	No. R-12-0040
PETITION TO AMEND RULE 15(a)(1), ARIZONA RULES OF CIVIL PROCEDURE	)	
	)	
	)	
	)	
	)	
	)	**FILED 08/28/2013**

ORDER
AMENDING RULE 15(a)(1), RULES OF CIVIL PROCEDURE

A petition having been filed proposing to amend Rule 15(a)(1), Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 15(a)(1), Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2014.

DATED this _____ day of August, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

RULES OF CIVIL PROCEDURE

Rule 15(a). Amendments

1. A party may amend the party's pleading once as a matter of course:

A. no later than ~~within~~ twenty-one days after serving it if the pleading is one to which no responsive pleading is permitted; or

B. no later than ~~within~~ twenty-one days after service of a responsive pleading if the pleading is one to which a responsive pleading is required or, if a motion under Rule 12(b), (e), or (f) is served, on or before the date on which a response to the motion is due, whichever is earlier.

Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires. Amendment as a matter of course after service of a motion under Rule 12(b), (e), or (f) does not, by itself, moot the motion as to the adequacy of the allegations of the pleading as revised in the amended pleading and does not relieve a party opposing the motion from filing a timely response to the motion.

(2) – (3) [No change]

*Additions to text are shown by underscoring; deletions by ~~strikeouts~~

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND ERs 1.5, 4.2, 4.3 and 6.5, RULE 42, RULES OF THE SUPREME COURT, and RULES 5.1 and 11, ARIZONA RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-12-0027 **FILED 08/28/2013**

ORDER
AMENDING ERs 1.5, 4.2, 4.3, AND 6.5, RULE 42, RULES OF THE SUPREME COURT, and RULES 5.1 and 11, ARIZONA RULES OF CIVIL PROCEDURE, ON A PERMANENT BASIS

These rules were amended on an emergency basis effective January 1, 2013, with a comment period ending May 21, 2013. Comments having been received, and upon consideration,

IT IS ORDERED adopting the rule changes, as set forth in the attachment hereto, on a permanent basis.

DATED this _____ day of August, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong
Ellen S Katz
Debra A Weecks, The Law Office of Debbie Weecks
Tom Gordon

ATTACHMENT*

RULES OF THE SUPREME COURT

Rule 42. Arizona Rules of Professional Conduct

* * *

ER 1.5. Fees

(a) [No change in text.]

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing before the fees or expenses to be billed at higher rates are actually incurred. The requirements of this subsection shall not apply to:

(1) court-appointed lawyers who are paid by a court or other governmental entity, and

(2) lawyers who provide pro bono short-term limited legal services to a client pursuant to ER 6.5.

* * *

ER 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

* * *

Comment [2013 amendment]

[4] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2 (c) is considered to be unrepresented for the purposes of this rule unless the opposing party or lawyer knows of the limited-scope representation and

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* Changes or additions to text are indicated by underscoring and deletions by ~~strikeouts~~.

the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client's behalf.

ER 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

* * *

Comment [2013 amendment]

[3] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2 (c) is considered to be unrepresented for the purposes of this rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client's behalf.

* * *

ER 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to ERs 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to ER 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by ERs 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), ER 1.10 is inapplicable to a representation governed by this Rule.

(c) ER 1.5 does not apply to a representation governed by this rule and for which the lawyer does not charge a fee.

Comment

* * *

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, ERs 1.5, 1.7, 1.9(a) and 1.10 become applicable.

* * *

ARIZONA RULES OF CIVIL PROCEDURE

* * *

Rule 5.1. Duties of Counsel

(a)-(b) [No change in text.]

(c) Limited Appearance. In accordance with ER 1.2, Arizona Rules of Professional Conduct, an attorney may undertake limited representation of a person involved in a court proceeding.

(1) An attorney may make a limited appearance by filing and serving a Notice of Limited Scope Representation. The notice shall:

(A) state that the attorney and the party have a written agreement that the attorney will provide limited scope representation to the party for the purpose of representing the party in such an action; and

(B) specify the matters, hearings, or issues with regard to which the attorney will represent the party.

(2) Service on an attorney making a limited appearance on behalf of a party shall constitute effective service on that party under Rule 5(c) with respect to all

matters in the action, but shall not extend the attorney's responsibility for representing the party beyond the specific matters, hearings, or issues for which the attorney has appeared.

(3) Upon an attorney's completion of the representation specified in the Notice of Limited Scope Representation, the attorney may withdraw from the action as follows:

(A) *With Consent.* If the client consents to withdrawal, the attorney may withdraw from the action by filing a Notice of Withdrawal with Consent, signed by both the attorney and the client, stating: (i) the attorney has completed the representation specified in the Notice of Limited Scope Representation and will no longer be representing the party; and (ii) the last known address and telephone number of the party who will no longer be represented. The attorney shall serve a copy of the notice on the party who will no longer be represented and on all other parties. The attorney's withdrawal from the action shall be effective upon the filing and service of the Notice of Withdrawal with Consent.

(B) *Without Consent.* If the client does not consent to withdrawal or to sign a Notice of Withdrawal with Consent, the attorney may file a motion to withdraw, which shall be served upon the client and all other parties, along with a proposed form of order.

(i) If no objection is filed within ten (10) days from the date the motion is served on the client, the court shall sign the order unless it determines that good cause exists to hold a hearing on whether the attorney has completed the limited scope representation for which the attorney has appeared. If the court signs the order, the withdrawing attorney shall serve a copy of the order on the client. The withdrawing attorney also shall promptly serve a written notice of the entry of such order, together with the name, last known address, and telephone number of the client, on all other parties.

(ii) If an objection is filed within ten (10) days of the service of the motion, the court shall conduct a hearing to determine whether the attorney has completed the limited scope representation for which the attorney appeared.

(d) Notice of Settlement. [No change in remaining text.]

* * *

Rule 11(a). Signing of pleadings, motions and other papers; sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address

shall be stated. A party who is not represented by an attorney shall sing the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee. An attorney may help to draft a pleading, motion or document filed by an otherwise self-represented person, and the attorney need not sign that pleading, motion, or document. In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND ARIZONA RULES OF CIVIL PROCEDURE (ARCP) RULE 4(d) (Process; By Whom Served)	Arizona Supreme Court No. R-12-0026 **FILED 08/28/2013**

ORDER
AMENDING RULE 4(d), RULES OF CIVIL PROCEDURE

A petition having been filed proposing to amend Rule 4(d), Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 4(d), Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2014.

DATED this _____ day of August, 2013.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
Philip Hazlett, President, Arizona Constables Association

ATTACHMENT*

RULES OF CIVIL PROCEDURE

Rule 4(d). Process; By Whom Served

Service of process shall be by a sheriff, a sheriff's deputy, a constable, a constable's deputy, a private process server certified ~~registered with the clerk of the court~~ pursuant to the Arizona Code of Judicial Administration § 7-204: Private Process Server and subpart (e) of this Rule, or any other person specially appointed by the court, except that a subpoena may be served as provided in Rule 45. Service of process may also be made by a party or that party's attorney where expressly authorized by these Rules. A ~~private process server or~~ specially appointed person shall be not less than twenty-one (21) years of age and shall not be a party, an attorney, or the employee of an attorney in the action whose process is being served. Special appointments to serve process shall be requested by motion to the presiding Superior Court judge and the motion shall be accompanied by a proposed form of order. The party submitting the proposed form of order shall comply with Rule 5(j)(2) under which the filing party includes the appropriate number of copies to be addressed to each party who has entered an appearance in the case and stamped, addressed envelopes for distribution of the resulting order, unless otherwise provided by the Presiding Judge. If the proposed form of order is signed, no minute entry shall issue. Special appointments shall be granted freely, are valid only for the cause specified in the motion, and do not constitute an appointment as a ~~registered~~ certified private process server.

*Additions to text are shown by underscoring; deletions by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 4.1(i), ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-11-0031 **FILED 12/10/2012**

ORDER
AMENDING RULE 4.1, ARIZONA RULES OF CIVIL PROCEDURE

A petition having been filed proposing to amend Rule 4.1(i), Arizona Rules of Civil Procedure, and comments having been received, upon consideration,

IT IS ORDERED that amendments to Rule 4.1, Arizona Rules of Civil Procedure, be adopted in accordance with the attachment hereto, effective January 1, 2013.

DATED this 10th day of December, 2012.

REBECCA WHITE BERCH
Chief Justice

ATTACHMENT[1]

Arizona Rules of Civil Procedure

Rule 4.1. Service of Process Within Arizona

(a) Territorial Limits of Effective Service. All process may be served anywhere within the territorial limits of the state.

(b) Summons; Service With Complaint. The summons and pleading being served shall be served together. The party procuring service is responsible for service of a summons and the pleading being served within the time allowed under Rule 4(i) of these Rules and shall furnish the person effecting service with the necessary copies of the pleading to be served.

(c) Waiver of Service; Duty to Save Costs of Service; Request to Waive.

(1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of such defendant.

(2) An individual, governmental entity, corporation, partnership or unincorporated association that is subject to service under paragraph (d), (h)(1)-(4)(A), ~~(i)~~ or (~~k~~i) of this Rule 4.1 and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request:

(A) shall be in writing and shall be addressed directly to the defendant in accordance with paragraph (d), (h) ~~(i)~~(1)-(4)(A), or (~~k~~i) of this Rule 4.1, as applicable;

(B) shall be dispatched through first-class mail or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

(D) shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request;

(E) shall set forth the date on which the request is sent;

(F) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent; and

(G) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and the complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under paragraph (d), (h)~~,~~ ~~(i)~~ or (~~k~~i) of this Rule 4.1, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

(d) Service of Summons Upon Individuals. Service upon an individual from whom a waiver has not been obtained and filed, other than those specified in paragraphs (e), (f) and (g) of this Rule 4.1, shall be effected by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the pleading to an agent authorized by appointment or by law to receive service of process.

(e) Service of Summons Upon Minors. Service upon a minor under the age of sixteen years shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon the minor and upon the minor's father, mother or guardian, within this state, or if none is found therein, then upon any person having the care and control of such minor, or with whom the minor resides.

(f) Service of Summons Upon A Minor With Guardian or Conservator. Service upon a minor for whom a guardian or conservator has been appointed in this state shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon such guardian or conservator and minor.

(g) Service of Summons Upon Incompetent Persons. Service upon a person who has been judicially declared to be insane, gravely disabled, incapacitated or mentally incompetent to manage that person's property and for whom a guardian or conservator has been appointed in this state shall be effected by service in the manner set forth in paragraph (d) of this Rule 4.1 upon such person and also upon that person's guardian or conservator, or if no guardian or conservator has been appointed, upon such person as the court designates.

(h) Service of Summons Upon ~~the State. If a waiver has not been obtained and filed, service upon the state shall be effected by delivering a copy of the summons and of the pleading to the attorney general. (i) Service of Summons Upon a County, Municipal Corporation or Other Governmental Subdivision.~~ a Governmental Entity. Service upon a ~~county or a municipal corporation or other~~ governmental ~~subdivision of the state~~ entity subject to suit, and from which a waiver has not been obtained and filed, shall be effected by delivering a copy of the summons and of the pleading to the ~~chief executive officer, the secretary, clerk, or recording officer thereof.~~ following individuals:

(1) For service upon the State, the Attorney General;

(2) For service upon a County, the Clerk of the Board of Supervisors thereof;

(3) For service upon a Municipal Corporation, the Clerk thereof; and

(4) For service upon any other governmental entity:

(A) The individual designated by the entity pursuant to statute to receive service of process; or

(B) If the entity has not pursuant to statute designated a person to receive service of process, then the chief executive officer(s), or, alternatively, the official secretary, clerk, or recording officer of the entity as established by law.

~~**(j) Service of Summons Upon Other Governmental Entities.** Service upon any governmental entity not listed above shall be effected by serving the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.~~

(~~k~~i) Service of Summons Upon Corporations, Partnerships or Other Unincorporated Associations. Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit in a common name, and from which a waiver has not been obtained and filed, shall be effected by delivering a copy of the summons and of the pleading to a partner, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the party on whose behalf the agent accepted or received service.

(~~l~~j) Service of Summons Upon a Domestic Corporation If Authorized Officer or Agent Not Found Within the State. When a domestic corporation does not have an officer or agent in this state upon whom legal service of process can be made, service upon such domestic corporation shall be effected by depositing two copies of the summons and of the pleading being served in the office of the Corporation Commission, which shall be deemed personal service on such corporation. The return of the sheriff of the county in which the action or proceeding is brought that after diligent search or inquiry the sheriff has been unable to find any officer or agent of such corporation upon whom process may be served, shall be prima facie evidence that the corporation does not have such an officer or agent in this state. The Corporation Commission shall file one of the copies in its office and immediately mail the other copy, postage prepaid, to the office of the corporation, or to the president, secretary or any director or officer of such corporation as appears or is ascertained by the Corporation Commission from the articles of incorporation or other papers on file in its office, or otherwise.

(~~m~~k) Alternative or Substituted Service. If service by one of the means set forth in the preceding paragraphs of this Rule 4.1 proves impracticable, then service may be accomplished in such manner, other than by publication, as the court, upon motion and without notice, may direct. Whenever the court allows an alternate or substitute form of service pursuant to this subpart, reasonable efforts shall be undertaken by the party making service to assure that actual notice of the commencement of the action is provided to the person to be served and, in any event, the summons and the pleading to be served, as

well as any order of the court authorizing an alternative method of service, shall be mailed to the last known business or residence address of the person to be served. Service by publication may be employed only under the circumstances, and in accordance with the procedures, specified in Rules 4.1(~~n~~l), 4.1(~~o~~m), 4.2(f) and 4.2(g) of these Rules.

(~~n~~l) Service by Publication; Return. Where the person to be served is one whose residence is unknown to the party seeking service but whose last known residence address was within the state, or has avoided service of process, and service by publication is the best means practicable under the circumstances for providing notice of the institution of the action, then service may be made by publication in accordance with the requirements of this subpart. Such service shall be made by publication of the summons, and of a statement as to the manner in which a copy of the pleading being served may be obtained, at least once a week for four successive weeks (1) in a newspaper published in the county where the action is pending, and (2) in a newspaper published in the county of the last known residence of the person to be served if different from the county where the action is pending. If no newspaper is published in any such county, then the required publications shall be made in a newspaper published in an adjoining county. The service shall be complete thirty days after the first publication. When the residence of the person to be served is known, the party or officer making service shall also, on or before the date of the first publication, mail the summons and a copy of the pleading being served, postage prepaid, to that person at that person's place of residence. Service by publication and the return thereof may be made by the party procuring service or that party's attorney in the same manner as though made by an officer. The party or officer making service shall file an affidavit showing the manner and dates of the publication and mailing, and the circumstances warranting the utilization of the procedure authorized by this subpart, which shall be prima facie evidence of compliance herewith. A printed copy of the publication shall accompany the affidavit. If the residence of the party being served is unknown, and for that reason no mailing was made, the affidavit shall so state.

(~~o~~m) Service by Publication; Unknown Heirs in Real Property Actions. When in an action for the foreclosure of a mortgage on real property or in any action involving title to real property, it is necessary for a complete determination of the action that the unknown heirs of a deceased person be made parties, they may be sued as the unknown heirs of the decedent, and service of a summons may be made on them by publication in the county where the action is pending, as provided in subpart (~~n~~l) of this Rule 4.1.

State Bar Committee Note

[No change in text.]

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 45 AND TO ADD NEW RULE 45.1, ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-12-0022
	)	**FILED 08/30/2012**

ORDER
DELETING RULE 30(h), AMENDING RULE 45,
AND PROMULGATING RULE 45.1, ARIZ. R. CIV. P.

A petition having been filed proposing to amend the rules pertaining to interstate discovery procedures, and comments having been received, upon consideration,

IT IS ORDERED that Rule 30(h), Ariz. R. Civ. P., be deleted, Rule 45, Ariz. R. Civ. P., be amended, and Rule 45.1, Ariz. R. Civ. P., be promulgated, all in accordance with the attachment hereto, effective January 1, 2013.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
Timothy J Berg
Barbara A Atwood
Aaron Nash
John A Furlong

ATTACHMENT[1]

ARIZONA RULES OF CIVIL PROCEDURE

Rule 30(h). ~~Depositions for foreign jurisdiction~~ (Deleted)

~~When an action is pending in a jurisdiction foreign to the State of Arizona and a party or a party's attorney wishes to take a deposition in this state, it may be done and a subpoena or subpoena duces tecum may issue therefor from the Superior Court of this state. The party or attorney shall file, as a civil action, an application, under oath, captioned as is the foreign action, which contains the following information:~~

~~(a) The caption of the case and the court in which it is pending including the names of all parties and the names of the attorneys for the parties;~~

~~(b) References to the law of the jurisdiction in which the action is pending which authorized the taking of the deposition in this state and such facts as, under that law, must appear to entitle the party to take the deposition and have a subpoena issued for the attendance of the witness;~~

~~(c) A certified copy of the notice of taking deposition, order of the court authorizing the deposition, commission or letters rogatory or such other pleadings as, under the law of the foreign jurisdiction, are necessary in order to take the deposition;~~

~~(d) A description of the notice given to other parties and a description of the service of the application to be made upon other parties to the action.~~

~~Upon the filing of the application, the clerk of the Superior Court of the county in which the deposition is to be taken shall forthwith issue the subpoena or subpoena duces tecum as requested by the application. An affidavit of service of the application upon all other parties to the civil action shall be filed with the clerk of the court.~~

~~No further proceedings in the Superior Court of the State of Arizona are required but any party or the witness may make such motions as are appropriate under the Arizona Rules of Civil Procedure.~~

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[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

Rule 45. Subpoena

(a) [No change in text.]

(b) For Attendance of Witnesses at Hearing, Trial or Deposition; Objections.

(1) *Issuing Court.* A subpoena commanding a person to attend and give testimony at a hearing or trial shall issue from the superior court for the county in which the hearing or trial is to be held. Except as otherwise provided in Rule 45.1, ~~A~~ a subpoena commanding a person to attend and give testimony at a deposition shall issue from the superior court for the county in which the case is pending.

(2)-(5) [No change in text.]

(c)-(g) [No change in text.]

Rule 45.1. Interstate Depositions and Discovery

(a) Definitions. In this Rule:

(1) Foreign jurisdiction means a state other than this state.

(2) Foreign subpoena means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) Person means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) State means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) Subpoena means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information; or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

(b) Issuance of Subpoena.

(1) To request issuance of a subpoena under this rule, a party must present a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. The foreign subpoena must include the following phrase below the case number: "For the Issuance of an Arizona Subpoena Under Ariz. R. Civ. P. 45.1." A request for the issuance of a subpoena under this rule does not constitute an appearance in the courts of this state.

(2) When a party presents a foreign subpoena to a clerk of court in this state, the clerk shall promptly issue a signed but otherwise blank subpoena to the party requesting it, and that party shall complete the subpoena before service.

(3) A subpoena under subsection (b)(2) must:

(A) state the name of the Arizona court issuing it;

(B) bear the caption and case number of the out-of-state case to which it relates, identifying (before the case number) the foreign jurisdiction and court where the case is pending;

(C) accurately incorporate the discovery requested in the foreign subpoena;

(D) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel;

(E) comply with the form specified in Rule 45(a)(1) and otherwise required in Rule 45; and

(F) not request discovery exceeding the discovery authorized in Rule 45.

(c) Service of Subpoena. A subpoena issued by a clerk of court under subsection (b) of this rule must be served in compliance with Rule 45(d).

(d) Deposition, Production, and Inspection. Rule 45 applies to subpoenas issued under subsection (b) of this rule. Depositions and other discovery taken pursuant to this rule shall be conducted consistent with, and subject to the limitations in, the Arizona Rules of Civil Procedure, including but not limited to Rules 26, 28, 30, 31, and 32.

(e) Motion or Application to a Court. A motion or application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under subsection (b) must comply with the rules or statutes of this state and be filed with the court in the county in which discovery is to be conducted. Any such motion or application must be filed as a separate civil action bearing the caption that appears on the subpoena. The following phrase must appear below the case number of the newly filed action: "Motion or Application Related to a Subpoena Issued Under Ariz. R. Civ. P. 45.1." Any later motion or application relating to the same subpoena must be filed in the same action.

Comment to 2012 Amendment

This rule derives from the Uniform Interstate Depositions and Discovery Act, 13 Pt.2 Uniform Laws Annotated 59 (West 2011 Supp.). In applying and construing this rule, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that adopt or enact it.

* * *

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULES 4(d) AND 4(e), ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-12-0021
	)	**FILED 08/30/2012**

ORDER
AMENDING RULES 4(d) and 4(e), ARIZONA RULES OF CIVIL PROCEDURE

A petition having been filed proposing to amend Rules 4(d) and 4(e), Arizona Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rules 4(d) and 4(e), Arizona Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2013.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
David K Byers
mwa

ATTACHMENT[1]

Rules of Civil Procedure

Rule 4(d). Process; By Whom Served

Service of process shall be by a sheriff, a sheriff's deputy, a private process server certified ~~registered with the clerk of the court~~ pursuant to the Arizona Code of Judicial Administration § 7-204: Private Process Server and subpart (e) of this Rule, or any other person specially appointed by the court, except that a subpoena may be served as provided in Rule 45. Service of process may also be made by a party or that party's attorney where expressly authorized by these Rules. A ~~private process server or~~ specially appointed person shall be not less than twenty-one (21) years of age and shall not be a party, an attorney, or the employee of an attorney in the action whose process is being served. Special appointments to serve process shall be requested by motion to the presiding Superior Court judge and the motion shall be accompanied by a proposed form of order. The party submitting the proposed form of order shall comply with Rule 5(j)(2) under which the filing party includes the appropriate number of copies to be addressed to each party who has entered an appearance in the case and stamped, addressed envelopes for distribution of the resulting order, unless otherwise provided by the Presiding Judge. If the proposed form of order is signed, no minute entry shall issue. Special appointments shall be granted freely, are valid only for the cause specified in the motion, and do not constitute an appointment as a ~~registered~~ certified private process server.

Rule 4(e) State-wide ~~Registration~~ Certification of Private Process Servers

A person who files with the clerk of the court an application for certification as a private process server, pursuant to the Arizona Code of Judicial Administration § 7-204, as adopted ~~approved~~ by the Supreme Court, ~~stating that the applicant has been a bona fide resident of the State of Arizona for at least one year immediately preceding the application and that the applicant will well and faithfully serve process in accordance with the law, and who otherwise complies with the procedures set forth by the Supreme Court in its Administrative Order regarding this subsection,~~ shall, upon approval of the court or presiding judge thereof, in the County where the application is filed, be registered with the clerk as a certified private process server until such ~~approval~~ certification is withdrawn by the court ~~in its discretion~~. The clerk shall maintain a register for this purpose. Such certified private process server shall be entitled to serve in such capacity for any court of the state anywhere within the State.

[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 31(c), ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-11-0044 **FILED 08/30/2012**

ORDER
AMENDING RULE 31(c), ARIZ. R. CIV. P.

A petition having been filed proposing to delete Rule 31(c), Ariz. R. Civ. P., and no comments having been received, upon consideration,

IT IS ORDERED that Rule 31(c), Ariz. R. Civ. P., be deleted in accordance with the attachment hereto, effective January 1, 2013.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
Ellen M Crowley

ATTACHMENT[1]

ARIZONA RULES OF CIVIL PROCEDURE

Rule 31(c). ~~**Notice of filing**~~ Deleted.

~~When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.~~

[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO ABROGATE RULE 16(g)(2) AND RULE 84, FORM 3 OF THE ARIZONA RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-11-0042 **FILED 08/30/2012**

ORDER
Rule 16(g)(2) and Rule 84, Form 3, Rules of Civil Procedure

A petition having been filed proposing to abrogate Rule 16(g)(2) (The Parties' Duty to Consider ADR, and to Confer and Report) and Rule 84, Form 3 (Joint Alternative Dispute Resolution Statement to the Court), and comments having been received, upon consideration,

IT IS ORDERED that Rule 16(g)(2), and Rule 8, Form 3, Rules of Civil Procedure, be abrogated effective January 1, 2013.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong
David C Tierney

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 55(a) OF THE ARIZONA RULES OF CIVIL PROCEDURE AND RULE 44 OF THE ARIZONA RULES OF FAMILY LAW PROCEDURE	)	Arizona Supreme Court No. R-11-0038
	)	**FILED 08/30/2012**

ORDER
AMENDING RULE 55(a) OF THE ARIZONA RULES OF CIVIL PROCEDURE AND RULE 44 OF THE ARIZONA RULES OF FAMILY LAW PROCEDURE

A petition having been filed proposing to amend Rule 55(a), Arizona Rules of Civil Procedure, and Rule 44, Arizona Rules of Family Law Procedure, and comments having been received, upon consideration,

IT IS ORDERED that Rule 55(a), Arizona Rules of Civil Procedure, and Rule 44, Arizona Rules of Family Law Procedure, be amended in accordance with the attachment hereto, effective January 1, 2013.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
Norman J Davis
Sarah R Simmons
Richard E Gordon
Aaron Nash
John A Furlong
mwa

ATTACHMENT[1]

Arizona Rules of Civil Procedure

Rule 55(a). Application and entry

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules, the clerk shall enter that party's default in accordance with the procedures set forth below. All requests for entry of default shall be by written application to the clerk of the court in which the matter is pending.

(1) *Notice.*

(i) To the Party. When the whereabouts of the party claimed to be in default are known by the party requesting the entry of default, a copy of the application for entry of default shall be mailed to the party claimed to be in default.

(ii) Represented Party. When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney for the party claimed to be in default. Nothing herein shall be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

(iii) Whereabouts of Unrepresented Party Unknown. If the whereabouts of a party claimed to be in default are unknown to the party requesting the entry of default and the identity of counsel for that party is also not known to the requesting party, the application for entry of default shall so state.

(iv) Other Parties. Nothing in this Rule relieves a party requesting entry of default from the requirements of Rule 5(a) as to service on other parties.

(2) *Entry of Default.* The acceptance by the clerk of the filing of the application for entry of default constitutes the entry of default.

(~~2~~3) *Effective Date of Default.* A default entered by the clerk shall be effective ten (10) days after the filing of the application for entry of default.

(~~3~~4) *Effect of Responsive Pleading.* A default shall not become effective if the party claimed to be in default pleads or otherwise defends as provided by these Rules prior to the expiration of ten (10) days from the filing of the application for entry of default.

(~~4~~5) *Applicability.* The provisions of this rule requiring notice prior to the entry of default shall apply only to a default sought and entered pursuant to this rule.

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[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

Arizona Rules of Family Law Procedure

Rule 44. Default Decree

A. Application and Entry. When a party against whom a judgment for affirmative relief is sought has failed to respond or otherwise defend as provided by these rules, the clerk shall enter that party's default in accordance with the procedures set forth below. All requests for entry of default shall be by written application to the clerk of the court in which the matter is pending.

1. *Notice.*

a. *To the Party.* When the whereabouts of the party claimed to be in default are known by the party requesting the entry of default, a copy of the application for entry of default shall be mailed to the party claimed to be in default.

b. *Represented Party.* When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of the application shall also be sent to the attorney for the party claimed to be in default. Nothing herein shall be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

c. *Whereabouts of Unrepresented Party Unknown.* If the whereabouts of a party claimed to be in default are unknown to the party requesting the entry of default and the identity of counsel for that party is also not known to the requesting party, the application for entry of default shall so state and shall be mailed to the unrepresented party's last known address.

2. *Entry of Default.* The acceptance by the clerk of the filing of the application for entry of default constitutes the entry of default.

~~2~~3. *Effective Date of Default.* A default entered by the clerk shall be effective ten (10) days after the filing of the application for entry of default.

~~3~~4. *Effect of Responsive Pleading.* A default shall not become effective if the party claimed to be in default pleads or otherwise defends as provided by these rules prior to the expiration of ten (10) days from the filing of the application for entry of default.

~~4~~5. *Applicability.* The provisions of this rule requiring notice prior to the entry of default shall apply only to a default sought and entered pursuant to this rule.

B. [No change in text.]

C. [No change in text.]

D. [No change in text.]

E. [No change in text.]

F. [No change in text.]

G. [No change in text.]

COMMITTEE COMMENT

[No change in text.]

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 8(c) OF THE ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-11-0035
	)	**FILED 08/30/2012**

ORDER
Rule 8(c), Rules of Civil Procedure

A petition having been filed proposing to amend the captioned rule, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 8(c), Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2013.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

Rule 8(c). Affirmative defenses

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, ~~discharge in bankruptcy,~~ duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

*Additions are shown by underscoring; deletions by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 56 OF ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-11-0034 **FILED 08/30/2012**

ORDER
AMENDING RULE 56, ARIZONA RULES OF CIVIL PROCEDURE

A petition having been filed proposing to amend Rule 56, Arizona Rules of Civil Procedure, and comments having been received, upon consideration,

IT IS ORDERED that Rule 56, Arizona Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2013.

DATED this _____ day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong
Sarah R Simmons
Richard E Gordon
Mark C Faull
Mwa

ATTACHMENT[1]

Arizona Rules of Civil Procedure

Rule 56. Summary Judgment

Rule 56(a). ~~For claimant~~ Motion for Summary Judgment or Partial Summary Judgment.

~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, after the expiration of twenty days from the service of process upon the adverse party, but no sooner than the date on which the answer is due, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof. Any such motion shall be filed no later than 90 days prior to the date set for trial.~~

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the request.

STATE BAR COMMITTEE NOTE

2005 Amendment

[No change in text.]

Rule 56(b). ~~For defending party~~ Time to File a Motion.

~~A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. Any such motion shall be filed no later than 90 days prior to the date set for trial.~~

(1) A claimant may move for summary judgment with or without supporting affidavits:

(A) after the expiration of 20 days from the service of process upon the adverse party, but no sooner than the date on which the answer is due, or

[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

(B) after service of a Rule 12(b)(6) motion to dismiss or a motion for summary judgment by the adverse party.

(2) Any other party may move for summary judgment, with or without supporting affidavits, at any time after the action is commenced.

(3) A motion by any party shall be filed no later than the dispositive motion deadline set by the court or local rule, or in the absence of such a deadline, 90 days before the date set for trial.

STATE BAR COMMITTEE NOTE

2005 Amendment

[No change in text.]

Rule 56(c). ~~Motion and proceedings thereon~~ Motion and Proceedings.

~~(1) Upon timely request by any party, the court shall set a time for hearing of the motion. If no request is made, the court may, in its discretion, set a time for such hearing. A party opposing the motion must file affidavits, memoranda or both within 30 days after service of the motion. The moving party shall have 15 days thereafter in which to serve reply memoranda and affidavits. The foregoing time periods may be shortened or enlarged by the court or by agreement of the parties. The judgment sought shall be rendered forthwith if the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~

~~(2) Any party filing a motion for summary judgment shall set forth, separately from the memorandum of law, the specific facts relied upon in support of the motion. The facts shall be stated in concise, numbered paragraphs. As to each fact, the statement shall refer to the specific portion of the record where the fact may be found. Any party opposing a motion for summary judgment shall file a statement in the form prescribed by this Rule, specifying those paragraphs in the moving party's statement of facts which are disputed, and also setting forth those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. In the alternative, the movant and the party opposing the motion shall file a joint statement in the form prescribed by this Rule, setting forth those material facts as to which there is no genuine dispute. The joint statement may provide that any stipulation of fact is not intended to be binding for any purpose other than the motion for summary judgment.~~

(1) Upon timely request by any party, the court shall set a time for hearing on the motion, provided, however, that the court need not conduct a hearing if it determines that

the motion should be denied or if the motion is uncontested. If no request for a hearing is made, the court may, in its discretion, set a time for such hearing.

(2) A party opposing the motion must file its response and any supporting materials within 30 days after service of the motion. The moving party shall have 15 days after service of the response in which to serve a reply memorandum and any supporting materials. These time periods may be shortened or enlarged by a filed stipulation of the parties or by court order; provided, however, that court approval is required for any stipulated extensions to a briefing schedule that would purport to make a reply or other memorandum due less than five days before a hearing date previously set by the court, or would require postponement of a scheduled hearing date or other modifications to an existing case scheduling order.

(3) Any party filing a motion for summary judgment shall set forth, in a statement separate from the memorandum of law, the specific facts relied upon in support of the motion. The facts shall be stated in concise, numbered paragraphs. As to each fact, the statement shall refer to the specific portion of the record where the fact may be found. Any party opposing a motion for summary judgment shall file a statement in the form prescribed by this Rule, specifying those paragraphs in the moving party's statement of facts which are disputed, and also setting forth those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. In the alternative, the movant and the party opposing the motion shall file a joint statement in the form prescribed by this Rule, setting forth those material facts as to which there is no genuine dispute. The joint statement may provide that any stipulation of fact is not intended to be binding for any purpose other than the motion for summary judgment.

STATE BAR COMMITTEE NOTE

2005 Amendment

[No change in text.]

STATE BAR COMMITTEE NOTE

1963 Amendment

[No change in text.]

2000 Amendment

[No change in text.]

Rule 56(d). ~~Case not fully adjudicated on motion~~ Declining to Grant All the Requested Relief.

~~If on motion under this Rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~

If the court does not grant all the relief requested by the motion, or if on independent consideration pursuant to section (h) of this Rule judgment is not rendered on the whole case, the court may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

Rule 56(e). Form of Affidavits and Depositions; Further Testimony; Defense Required.

~~Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. Only a written transcript of a deposition or portion thereof and not any electronic recording thereof may be submitted in support of or opposition to a motion for summary judgment except where a party contends that the written transcript is erroneous. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

(1) An affidavit used to support or oppose a motion shall be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a properly authenticated copy shall be attached to or served with the affidavit.

(2) Affidavits may be supplemented or opposed by depositions, answers to interrogatories, additional affidavits or other materials that would be admissible in evidence.

(3) If all or part of a deposition is submitted in support of or in opposition to a motion for summary judgment, the offering party must submit a written transcript of the testimony. An electronic recording of the testimony may be submitted only if the offering party contends that the written transcript is erroneous.

(4) When a motion for summary judgment is made and supported as provided in this Rule, an opposing party may not rely merely on allegations or denials of its own pleading; rather, its response must, by affidavits or as otherwise provided in this Rule, set forth specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment, if appropriate, shall be entered against that party.

STATE BAR COMMITTEE NOTE

1963 Amendment

[No change in text.]

Rule 56(f). ~~When affidavits are unavailable~~ When Facts are Unavailable to the Nonmovant; Request for Rule 56(f) Relief and Expedited Hearing.

~~Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.~~

(1) If a party opposing summary judgment files a request for relief and expedited hearing under this Rule, along with a supporting affidavit showing that, for specified reasons, it cannot present evidence essential to justify its opposition, the court may, after holding a hearing:

(A) defer considering the motion for summary judgment and allow time to obtain affidavits or to take discovery before a response to the motion is required;

(B) deny the requested relief and require a response to the motion for summary judgment by a date certain; or

(C) issue any other appropriate order.

(2) Unless otherwise ordered by the court, the filing of a request for relief and affidavit under this section does not by itself extend the date by which the party opposing summary judgment must file a memorandum and separate statement of facts as prescribed in section (c) of this Rule.

(3) No request for relief will be considered and no hearing will be scheduled unless the request for relief is accompanied by a separate statement of counsel seeking the relief certifying that, after personal consultation and good-faith efforts to do so, the parties have been unable to satisfactorily resolve the matter.

(4) The party moving for summary judgment is not required to file a response to the request for relief or affidavit unless otherwise ordered by the court. If such a party elects to file a response, it must be filed no later than two days before the hearing scheduled to consider the requested relief.

(5) Except as provided in subsection (3), the court shall hold an expedited hearing concerning the requested relief, in person or by telephone, within seven days after the filing of a request for hearing by the party seeking the relief. If the court's calendar does not allow a hearing within seven days, a later date may be set.

Rule 56(g). Affidavits ~~m~~Made in ~~b~~Bad ~~f~~Faith.

~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.~~

If satisfied that an affidavit under this Rule is submitted in bad faith or solely for delay, the court may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result, or may impose other appropriate sanctions. The court shall allow notice and a reasonable time to respond before imposing any sanctions pursuant to this section.

Rule 56(h). Judgment Independent of the Motion or Based on Materials Not Cited in the Motion.

After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment after identifying for the parties material facts that may not be genuinely in dispute.

Comment to 2012 Amendments to Rule 56

Rule 56 is revised in several respects. The language of some sections is updated and simplified to conform to the 2010 restyling of Rule 56 of the Federal Rules of Civil Procedure, with no intended substantive change to Arizona's rule or summary judgment procedure. These revisions are selective and reflect a determination that fundamental differences between Arizona's rule and the counterpart federal rule weigh against wholesale adoption of the federal rule amendments. In addition, a number of other changes have been made to improve or clarify Arizona's summary judgment practice.

Section (a). The standard for granting summary judgment has been moved from section (c) to section (a). In addition, the language of new section (a) has been modified to conform to the language of Federal Rule of Civil Procedure 56(a). These changes are stylistic and are not intended to alter the substantive requirements for obtaining summary judgment as developed in Arizona case law, including *Orme School v. Reeves,* 166 Ariz. 301, 802 P.2d 1000 (1990), and its progeny. Likewise, the new language, which recognizes the availability of partial summary judgment, is not intended to change existing Arizona law.

Section (b). Section (b) incorporates aspects of former sections (a) and (b), governing when a claimant and defending party, respectively, may move for summary judgment. Former section (a) restricted a claimant's ability to move for summary judgment until after the answer was due or the adverse party moved for summary judgment, while section (b) allowed a defending party to move for summary judgment at any time. The amendment additionally authorizes a claimant to move for summary judgment after an opposing party moves to dismiss under Rule 12(b)(6). Subsection (3) is modified to clarify that any dispositive motion cut-off established by the court will control over the 90-day period provided in the rule.

Section (c). Section (c)(1) is modified to clarify certain hearing and briefing requirements. The standard for granting summary judgment has been moved to section (a).

Section (d). Section (d) is modified to conform to the stylistic revisions to Federal Rule of Civil Procedure 56(g), which simplified the language of this section and made it more concise. No substantive change is intended. Section (d) cross-references new

section (h), which allows the court to grant summary judgment on independent consideration in appropriate circumstances.

Section (e). The first sentence of section (e) is modified to conform to the stylistic revisions to similar language contained in Federal Rule of Civil Procedure 56(c)(4). Other stylistic revisions were made to the remainder of the section to make it easier to understand. No substantive change is intended.

Section (f). Section (f) is modified in several significant respects. Subsection (1) has been modified to set forth a uniform procedure requiring the filing of a request for Rule 56(f) relief and expedited hearing, along with a supporting Rule 56(f) affidavit. Subsection (1) also requires a hearing before relief can be granted. Subsection (2) clarifies that absent a court order extending the time for response, filing a request for Rule 56(f) relief does not extend the date for opposing a motion for summary judgment. Subsection (3), modeled after Arizona Rule of Civil Procedure 26(g), requires a party seeking relief to attempt to resolve the issue by good-faith personal consultation with the opposing party and to submit a separate certification regarding such consultation with its Rule 56(f) affidavit. Subsection (4) provides that the party moving for summary judgment is generally not required to file a response to the request for Rule 56(f) relief; but, if it chooses to do so, it must file the response within two days of the scheduled hearing. Finally, subsection (5) adopts an expedited hearing procedure, requiring courts to hold a telephonic or in-person hearing within seven days after any hearing request filed by the party seeking the relief. These procedures are intended to facilitate resolution of section (f) disputes and minimize the need for court intervention. Section (f) affidavits must continue to satisfy the specificity requirements set forth in existing Arizona case law. *E.g., Simon v. Safeway, Inc.*, 217 Ariz. 330, 173 P.3d 1031 (Ct. App. 2007).

Section (g). Section (g) is modified to conform to the stylistic revisions to counterpart Federal Rule of Civil Procedure 56(h), which simplified the language of this section and made it more concise. Additionally, section (g)'s reference to the sanction of "contempt" has been eliminated. The rule allows "other appropriate sanctions," leaving it to the court to determine whether a sanction of contempt is warranted by the applicable substantive law. The language of section (g) also has been modified to make clear that notice and an opportunity to respond are required before the court may impose any sanctions.

Section (h). New section (h) is based on counterpart Federal Rule of Civil Procedure 56(f). The section recognizes the court's inherent authority to dispose of matters on summary judgment on the court's own initiative, where appropriate. The section (h) procedure strikes a balance between the court's inherent power and the rights of litigants, by requiring notice and a hearing before the court may grant summary

judgment for a nonmovant, grant a motion on grounds not raised by a party, or otherwise consider summary judgment on the court's own initiative.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 53(b)(3), ARIZONA RULES OF CIVIL PROCEDURE	)	Arizona Supreme Court No. R-11-0032 **FILED 08/30/2012**

ORDER
Rule 53(b)(3), Rules of Civil Procedure

A petition having been filed proposing to amend the captioned rule, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 53(b)(3), Rules of Civil Procedure, be amended in accordance with the attachment hereto, effective January 1, 2013.

DATED this 30th day of August, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

Rule 53(b). Order appointing master

* * * *

(3) ~~Entry of Order. The court may enter the order appointing a master only after the prospective appointee has filed an affidavit disclosing whether there is any ground for disqualification under Rule 81 of the Rules of the Supreme Court of Arizona, and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the grounds of disqualification.~~ *Acceptance of Appointment.* Before accepting an appointment as a master, the prospective appointee shall file an affidavit or declaration disclosing whether there is any ground for disqualification under Rule 81 of the Rules of the Supreme Court of Arizona. If a potential ground for disqualification is disclosed, the prospective appointee shall not proceed with the appointment unless the parties have consented (with the court's approval) to waive the ground for disqualification.

***Additions are shown by underscoring; deletions by ~~strikeouts~~.**

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULES 13(f) and RULE 15(a)(1), RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-11-0010 **FILED 09/01/2011**

ORDER
Rules 13(f) and 15(a)(1), Rules of Civil Procedure

A petition having been filed proposing to abrogate Rule 13(f) and amend Rule 15(a)(1), Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 13(f), Rules of Civil Procedure be abrogated and Rule 15(a)(1), Rules of Civil Procedure be amended, in accordance with the attachment hereto, effective January 1, 2012.

DATED this _____ day of September, 2011.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

Rule 13(f). ~~Omitted Counterclaim~~

~~When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment~~ [Abrogated]

Rule 15(a). Amendments

1. A party may amend the party's pleading once as a matter of course:

   A. within twenty-one days after serving it if the pleading is one to which no responsive pleading is permitted; or

   B. within twenty-one days after service of a responsive pleading if the pleading is one to which a responsive pleading is required or, if a motion under Rule 12(b), (e), or (f) is served, on or before the date on which a response to the motion is due, whichever is earlier.

~~at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, the party may so amend it at any time within twenty days after it is served.~~ Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires. Amendment as a matter of course after service of a motion under Rule 12(b), (e), or (f) does not, by itself, moot the motion as to the adequacy of the allegations of

the pleading as revised in the amended pleading and does not relieve a party opposing the motion from filing a timely response to the motion.

2. A party who moves for leave to amend a pleading must attach a copy of the proposed amended pleading as an exhibit to the motion, which shall indicate in what respect it differed from the pleading that it amends, by bracketing or striking through the text to be deleted and underlining the text to be added. If a motion for leave to amend is granted, the moving party shall file and serve the amended pleading within ten days of the order granting the motion, unless the court otherwise orders.

3. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

*Additions to text are indicated by underscoring, deletions by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 77, ARIZONA RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-11-0008 **FILED 09/01/2011**

ORDER
Rule 77, Rules of Civil Procedure

A petition having been filed proposing to amend Rule 77, Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 77, Rules of Civil Procedure be amended in accordance with the attachment hereto, effective January 1, 2012.

DATED this _____ day of September, 2011.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

Rule 77. Right of Appeal

(a) – (c)

[No change]

~~(d) **Change of Judge**. Upon filing a notice of appeal, all rights to change of judge are renewed and no event prior thereto shall constitute a waiver.~~

(e) – (g)

[No change]

*Additions to text are indicated by underscoring, deletions by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO PERMANTELY ADOPT RULES 8(h)(3), 8(i), 16.3, 39.1 AND 84 (FORM 10), ARIZONA RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-10-0036 **FILED 09/01/2011**

ORDER
ADOPTING RULES 8(h)(3), 8(i), 16.3, 39.1 AND 84 (FORM 10), ARIZONA RULES OF CIVIL PROCEDURE, AS AMENDED, ON A PERMANENT BASIS

A petition having been filed proposing to adopt Rules 8(h)(3), 8(i), 16.3, 39.1 and 84 (Form 10), Arizona Rules of Civil Procedure, as amended, on a permanent basis, and comments having been received, upon consideration,

IT IS ORDERED that Rules 8(h)(3), 8(i), 16.3, 39.1 and 84 (Form 10), Arizona Rules of Civil Procedure, as amended, be adopted on a permanent basis in accordance with the attachment hereto, effective January 1, 2012.

DATED this _____ day of September, 2011.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
David K Byers
John A Furlong
Mwa

ATTACHMENT[1]

ARIZONA RULES OF CIVIL PROCEDURE

* * *

Rule 8(h). Civil Cover Sheets; Classification of Civil Actions

(1)-(2) [No change in text.]

(3) In those counties in which a complex civil litigation program has been established, in addition to the ~~the~~ Civil Cover Sheet designation required by subsection (1), the caption shall also identify the action as complex if the action meets the criteria listed in Rule 8(i).

Rule 8(i). Complex Civil Litigation Program Designation

(1) [No change in text.]

(2) **Factors.** In deciding whether a civil action is a complex case under ~~subdivision (a)~~ subsection (1), the court shall consider the following factors:

(A) ~~N~~numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;

(B) ~~M~~management of a large number of witnesses or a substantial amount of documentary evidence;

(C) ~~M~~management of a large number of separately represented parties;

(D) ~~C~~coordination with related actions pending in one or more courts in other counties, states or countries, or in a federal court;

(E) ~~S~~substantial postjudgment judicial supervision;

(F) ~~T~~the case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law;

(G) ~~I~~inherently complex legal issues;

(H) ~~F~~factors justifying the expeditious resolution of an otherwise complex dispute; and

[1] Changes or additions in rule text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

(I) ~~A~~any other factor which in the interests of justice warrants a complex designation or as otherwise required to serve the interests of justice.

(3) [No change in text.]

(4) **Procedure for opposing designation**. If a plaintiff has certified a case as complex and the court has not previously declared the action to be a complex case, and the defendant disagrees with the plaintiff's assertion as to complexity, the defendant shall file and serve no later than that party's first responsive pleading a response to plaintiff's motion and a controverting certification that specifies the particular reason for the defendant's disagreement with plaintiff's certificate.

(5) **Designation by defendant or joint designation.** A defendant may designate an action as a complex case if the plaintiff has not done so and if the court has not already made a ruling in this matter by filing a motion and the certification of complex case described in subsection (3) at or before the time of filing defendant's first responsive pleading and serving them upon the plaintiff. The parties may join in designating an action as a complex case by filing a joint motion and certification of complex case with or before the filing of defendant's first responsive pleading.

(6)-(7) [No change in text.]

(8) **Program Designation Certification Form.** The certification of a complex case shall be substantially in the ~~following~~ form set forth in Rule 84, Form 10.~~:~~

~~IN THE SUPERIOR COURT OF ARIZONA~~

~~IN AND FOR THE COUNTY OF MARICOPA~~

~~)~~

~~_____,) Case No. _____~~

~~Plaintiff))~~

~~) [ ] Certification of Complexity~~

~~vs.) [ ] Joint Certification of Complexity~~

~~) [ ] Contravening Certification ;~~

~~_____)~~

~~Defendant)~~

~~_____)~~

~~[ ] The (undersigned certifies) (parties certify) that this action is a complex case for the following reasons:~~

[ ] Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve

[ ] Management of a large number of witnesses or a substantial amount of documentary evidence

[ ] Management of a large number of separately represented parties

[ ] Coordination with the following related actions pending in one or more courts in other counties, states or countries, or in a federal court: _____

[ ] Substantial postjudgment judicial supervision

[ ] The case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law

[ ] Inherently complex legal issues

[ ] Factors justifying the expeditious resolution of an otherwise complex dispute

[ ] The following other factor(s) warranting designation as a complex case, in the interest of justice: _____

[ ] The (undersigned certifies) (parties certify) that this action is not a complex case for the following reasons: _____

Dated this _____ day of _____, 200_____

_____
(Attorney for) (Plaintiff) (Defendant)

_____
(Attorney for) (Plaintiff) (Defendant)

[This certification must be accompanied by a motion]

COMMENT TO ~~EXPERIMENTAL~~ RULE 8(i)

~~Experimental~~ Rule 8(i) is intended to establish a process by which the parties can alert the court to the complex nature of their dispute. However, the determination that a case is, in fact, eligible for the complex litigation program is to be made by the presiding judge or designee. The parties are not to self-select in the absence of a determination by the court on good cause shown.

Justification for this rule: [No change in text.]

* * *

Rule 16.3. Initial Case Management Conference in Cases Assigned to the Complex Civil Litigation Program

(a) Subjects for Consideration. Once a case is determined to be a complex civil case, an initial case management conference with all parties represented shall be conducted at the earliest practical date, and a Case Management Order issued by the court promptly thereafter. Among the subjects that should be considered at such a conference are:

(1) the Sstatus of parties and pleadings;

(2) Ddetermining whether severance, consolidation, or coordination with other actions is desirable;

(3) Sscheduling motions to dismiss or other preliminary motions;

(4) Sscheduling class certification motions, if applicable;

(5) Sscheduling discovery proceedings, setting limits on discovery and determining whether to appoint a discovery master;

(6) Iissuing protective orders;

(7) Aany requirements or limitations for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced;

(8) Aany measures the parties must take to preserve discoverable documents or electronically stored information;

(9) Aany agreements reached by the parties for asserting claims of privilege or of protection as to trial-preparation materials after production;

(10) Aappointing liaison counsel and admission of non-resident counsel;

(11) Sscheduling settlement conferences;

(12) Nnotwithstanding Rule 26.1, the establishment and timing of disclosure requirements;

(13) Sscheduling expert disclosures and whether sequencing of expert disclosures is warranted;

(14) Sscheduling dispositive motions;

(15) Aadopting a uniform numbering system for documents and establishing a document depository;

(16) Ddetermining whether electronic service of discovery materials and pleadings is warranted;

(17) Oorganizing a master list of contact information for counsel;

(18) Ddetermining whether expedited trial proceedings are desired or appropriate;

(19) Sscheduling further conferences as necessary;

(20) Uuse of technology, videoconferencing and/or teleconferencing;

(21) Ddetermination of whether the issues can be resolved by summary judgment, summary trial, trial to the court, jury trial, or some combination thereof;

and

(22) Ssuch other matters as the court or the parties deem appropriate to manage or expedite the case.

(b)-(e) [No change in text.]

COMMENT

Justification for this rule. Rule 16.3 is intended to supplement the Arizona Rules of Civil Procedure in a manner that will provide judges and litigants with appropriate procedural mechanisms for the fair, efficient and expeditious management of discovery, disclosures, motions, service of documents and pleadings, communications between and among counsel and the court, trial, and other aspects of complex civil litigation. Other than as specifically set forth, cases assigned to the complex litigation program are not exempt from any normally applicable rule of procedure, except to the extent the trial judge may order otherwise. ~~Experimental~~ Rule 16.3 should be available to any trial judge who wishes to follow it, in whole or in part, in managing a civil dispute, even in cases that are not formally assigned to a complex litigation program.

Case Management Resources. [No change in text.]

* * *

Rule 39.1 Trial of Cases Assigned to the Complex Civil Litigation Program

[No change to the existing text of Rule 39.1.]

COMMENT

Justification for this rule. Rule 39.1, like Rule 16.3, is intended to supplement the Arizona Rules of Civil Procedure in a manner that will provide judges and litigants with appropriate procedural mechanisms for the fair, efficient and expeditious management of discovery, disclosures, motions, service of documents and pleadings, communications between and among counsel and the court, trial, and other aspects of complex civil litigation. Other than as specifically set forth, cases assigned to the complex litigation program are not exempt from any normally applicable rule of procedure, except to the extent the trial judge may order otherwise. ~~Experimental~~ Rule 39.1 should be available to any trial judge who wishes to follow it, in whole or in part, in managing a civil dispute, even in cases that are not formally assigned to a complex litigation program.

* * *

Rule 84. Forms

* * *

Form 10. Certification of a Complex Case

IN THE SUPERIOR COURT OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

)

_____,) Case No. _____

Plaintiff)

) [ ] Certification of Complexity

vs.) [ ] Joint Certification of Complexity

) [ ] Contravening Certification _____

)

Defendant)

)

_____

[ ] The (undersigned certifies) (parties certify) that this action is a complex case for the following reasons:

[ ] Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve

[ ] Management of a large number of witnesses or a substantial amount of documentary evidence

[ ] Management of a large number of separately represented parties

[ ] Coordination with the following related actions pending in one or more courts in other counties, states or countries, or in a federal court: _____

_____

[ ] The case would benefit from permanent assignment to a judge who would have acquired a substantial body of knowledge in a specific area of the law

[ ] Inherently complex legal issues

[ ] Factors justifying the expeditious resolution of an otherwise complex dispute

[ ] The following other factor(s) warranting designation as a complex case, in the interest of justice:

_____

_____

_____

[ ] The (undersigned certifies) (parties certify) that this action is not a complex case for the following reasons:

_____

_____

_____

_____

Dated this ____ day of _____, 200__.

_____

(Attorney for) (Plaintiff) (Defendant) (Attorney for) (Plaintiff) (Defendant)

[This certification must be accompanied by a motion]

SUPREME COURT OF ARIZONA

In the Matter of PETITION TO AMEND RULE 55(a)(1), ARIZONA RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-10-0034

FILED 09/01/2011

ORDER
Rule 55(a)(1), Rules of Civil Procedure

A petition having been filed proposing to amend Rule 55(a)(1), Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED that Rule 55(a)(1), Rules of Civil Procedure be amended by adding a new paragraph (iv) as set forth in the attachment hereto, effective January 1, 2012.

DATED this _____ day of September, 2011.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

(iv) Other Parties. Nothing in this Rule relieves a party requesting entry of default from the requirements of Rule 5(a) as to service on other parties.

*Additions to text are indicated by underscoring, deletions by ~~strikeouts~~.

SUPREME COURT OF ARIZONA

In the Matter of RULE 68(h) AND RULE 74(g), RULES OF CIVIL PROCEDURE	Arizona Supreme Court No. R-10-0030 **FILED 09/01/2011**

ORDER
Rules 68 and 74, Rules of Civil Procedure

A petition having been filed proposing to amend Rule 68(h) and the title of Rule 74, and to add a new paragraph (g) to Rule 74, Rules of Civil Procedure, and no comments having been received, upon consideration,

IT IS ORDERED amending Rule 68(a), (g), and (h), the title of Rule 74, and Rule 74(c)(1), and adding a new paragraph (g) to Rule 74, Rules of Civil Procedure, in accordance with the attachment hereto, effective January 1, 2012.

DATED this _____ day of September, 2011.

REBECCA WHITE BERCH
Chief Justice

TO:
Rule 28 Distribution
John A Furlong

ATTACHMENT*

Rule 68. Offer of Judgment

(a) Time for Making; Procedure. At any time more than 30 days before the trial begins, any party may serve upon any other party an offer to allow judgment to be entered in the action. However, in cases subject to arbitration, no offer of judgment may be made during the period beginning 25 days before the arbitration hearing and ending upon the date of the filing of any notice of appeal of an award pursuant to Rule 77(a).

(b) – (f) [No change]

(g) Sanctions. If the offeree rejects an offer and does not later obtain a more favorable judgment other than pursuant to this Rule, the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer and prejudgment interest on unliquidated claims to accrue from the date of the offer. If the judgment includes an award of taxable costs or attorneys' fees, only those taxable costs and attorneys' fees determined by the court as having been reasonably incurred as of the date the offer was made shall be considered in determining if the judgment is more favorable than the offer. The determination whether a sanction should be imposed after an arbitration hearing shall be made by reference to the judgment ultimately entered, whether on the award itself pursuant to Rule 76(c) or after an appeal of the award pursuant to Rule 77.

(h) Effective Period of Offers; Subsequent Offers; Offers on Damages. An offer of judgment made pursuant to this Rule shall remain effective for 30 days after it is served, except that (i) an offer made within 60 days after service of the summons and complaint shall remain effective for 60 days after service, ~~and~~ (ii) an offer made within 45 days of trial shall remain effective for 15 days after service, and (iii) in a case subject to arbitration, an offer that has not previously expired shall expire at 5:00 p.m. on the fifth day before the arbitration hearing. If the effective period is enlarged by the court, the offeror may withdraw the offer at any time after expiration of the initial effective period and prior to acceptance of the offer. The fact that an offer has been rejected does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not fewer than 10 days before the commencement of hearings to determine the amount or extent of liability.

Rule 74. Powers of Arbitrator; Scheduling of Arbitration Hearing; Permitted Rulings by Arbitrator; Time for Filing Summary Judgment Motion; Receipt of Court File; Settlement of Cases; Offer of Judgment.

(a) – (b) [No change]

(c) Rulings by Arbitrator

(1) *Authorized Rulings.* After a case has been assigned to an arbitrator, the arbitrator shall make all legal rulings, including rulings on motions, except:

(A) – (C) [No change]

(D) motions to withdraw as attorney of record under Rule 5.1 of these rules; ~~or~~

(E) motions for summary judgment that, if granted, would dispose of the entire case as to any party~~.~~; or

(F) motions for sanctions under Rule 68 of these rules.

(d) – (f) [No change]

(g) Offer of Judgment. Any party to an action either subject to compulsory arbitration under A.R.S. § 12-133 and these rules or referred to arbitration by Agreement of Reference may serve upon any other party an offer of judgment pursuant to Rule 68.

Paul Julien and Mark Meltzer, Justice Court Rules Effective in 2013, 49 Arizona Attorney 30 (January, 2013)[1]

The Arizona Supreme Court adopted the Justice Court Rules of ***Civil Procedure*** *("JCRCP") on August 28, 2012. These new rules will become effective on January 1, 2013. Below are answers to some of the most frequently asked questions about the JCRCP.*

Q What issues are addressed by the new justice court civil rules?

A Most of the defendants in justice court civil cases are unrepresented. In her Justice 20/20 Strategic Agenda, Chief Justice Berch stated, "The legal system can be intimidating and its complexity can make navigation difficult for ... litigants not represented by counsel. Simplifying the rules for less complex cases and streamlining case management processes can help make court proceedings understandable and should result in greater public trust and confidence in the system." The Strategic Agenda included a goal of addressing these issues with a separate, simplified set of rules for civil cases in justice court.

Q Who drafted the new rules?

A A committee established by the Chief Justice drafted the rules. The committee members included a judge of the superior court, four justices of the peace, and a justice court manager. The members also included three private attorneys who practice in justice court (two collection attorneys and one consumer advocate), attorneys from three legal aid organizations, the chair of the State Bar's Civil Practice and Procedure Committee, the former co-chair of the State Bar's Landlord-Tenant Task Force, and a member of the public.

Q Did the committee request comments on these rules?

A Yes. The committee filed a rule petition with the Supreme Court in January 2012. The committee received and considered dozens of formal and informal comments, which led the committee to further discuss, revise and improve the rules. In May 2012, after the committee addressed a number of the State Bar's initial concerns, the Bar filed a comment fully supporting the proposed rules.

Q To what types of cases will the new rules apply?

A These rules will apply to civil lawsuits in justice court. Some of the new rules will apply in small claims cases. However, the rules will not apply to evictions, civil traffic or civil boating proceedings, or to protective orders or injunctions against harassment in justice court.

Q How are the rules of justice court and superior court different?

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[1]

A The superior court rules served as the model for the justice court rules, so both sets of rules follow parallel procedural principles. There are differences between these two sets of rules in diction, length and organization. The wording of a justice court rule may vary considerably, or only slightly, from a superior court rule; these variations make the justice court rule simpler and easier to understand. The justice court rules, excluding forms and appendices, are about one-fifth the length of the superior court rules. In addition, the numbering and the sequence of the new rules differ from the superior court rules.

Q Why does the justice court rule numbering system differ from that of the Arizona Rules of Civil Procedure?

A Various superior court rules--for example, rules on masters, receivers, declaratory judgments and injunctions--do not apply in justice court. Excluding those rules would have resulted in gaps in rule numbering. The committee considered using the superior court numbering with notations advising that certain rules did not apply in justice court, but this might have been perplexing for self-represented litigants. Three-digit rule numbers will quickly distinguish these rules from superior court rules.

Q Why does the justice court rule sequence differ from that of the superior court rules?

A Re-sequencing the rules allowed a more logical arrangement. People with no legal training might find a specific rule more easily if the rule is in a logical table of contents, one that more closely follows the actual sequence of events in litigation.

Q How simple are the justice court rules?

A The justice court rules may not be "simple," but neither are they a "lite" version of the superior court rules. Both sets of rules cover an array of **civil procedures**, and they have similar functionality, but the justice court rules ""simplify" the superior court rules.

As one illustration of simplification, JCRCP Rule 107(b) reduced 130 technical words of superior court Rule 8(e) to eight words of plain English. Although attorneys understand legal terms used in the superior court rules, those rules tend to omit definitions. To assist litigants who are not law-trained, the justice court rules include definitions or explanations of about 30 basic legal words, such as "party," "summons," "interrogatories," ""depositions" and "default."

Q Do the committee members really expect that self-represented litigants will read the new rules?

A Some comments suggested that justice court rules should not be longer than one page; others said that many self-represented litigants would not even read a single page. However, the committee concluded that at least some self-represented litigants will read court rules, and those litigants should

be able to understand the new justice court rules more than they do the superior court rules. One legal aid member of the committee observed that we should not underestimate the ability of self-represented litigants to use legal information that is organized and straightforward.

Nonetheless, the committee acknowledged that some individuals would not read any rules, and the new rules therefore require service of a one-page notice with the summons. The "notice to defendant" will provide many defendants with useful details about responding to a civil complaint, where to get help, and their rights and responsibilities in a justice court lawsuit. This notice is similar to a residential eviction information sheet that a property owner serves on a tenant under the eviction rules.

Q Will case law developed under the superior court rules continue to apply in justice court?

A Yes. As noted above, the superior court rules were the model for these new rules, and case law interpreting a corresponding superior court rule will continue to be authoritative unless a justice court rule adds a requirement or provides a right not found in the superior court rule. Corresponding superior court rules have been included in brackets at the end of a justice court rule; a table in the appendix of the new rules also cross-references JCRCP provisions with related rules in the Arizona Rules of **Civil Procedure**.

Q What else should attorneys know about the new rules?

A The new rules provide protections for self-represented litigants that are not contained in the superior court rules. Here are a few of them:

- Discovery notices must inform the opposing party of a duty to respond, and the possible consequences of failing to respond; details are included in the discovery rules.

- Because an unanswered request for admission can be dispositive of a case, the rule includes a requirement that in the event a party who received the request fails to timely respond, that party will have an additional "grace period" for providing a response, similar to a grace period in a default proceeding.
- A notice of service of interrogatories, or a request for production or admissions, must provide an actual calendar date when the response is due.
- The rules require a notice at the beginning of any motion that advises the other party of the right to file a response, and the consequences of not responding to the motion. The rule on summary judgment motions requires that this notice provide information about what needs to be included in a response.
- Some, but not all, plaintiffs now serve the defaulting defendant with a motion for entry of default judgment; the new rules require service

The few examples mentioned in this answer don't cover all of the changes. We encourage

attorneys who practice in justice court to read the rules to familiarize themselves with the new provisions. Attorneys should be able to read the entire JCRCP relatively quickly.

Q Where can I find the JCRCP?

A The JCRCP will be included in West's 2013 edition of the Arizona Rules of Court. Meanwhile, the rules are an attachment to the Supreme Court Order that adopted them, R-12-0006, and they are available on the Arizona Judicial Branch website:

www.azcourts.gov/Portals/20/2012Rules/R120006.pdf

Peter S. Kozinets and Aaron J. Lockwood, Discovery in the Age of Facebook, 47 Arizona Attorney 42 (July/August 2011)[2]

Social networking sites such as Facebook, YouTube and Twitter have become an increasingly useful source of evidence in litigation. For example, a spouse with an unfaithful partner, an insurance company facing a fraudulent claim, a criminal defendant in need of an alibi, or a prosecutor looking for a smoking gun all might find a trove of helpful evidence online. Indeed, 80 percent of Americans now regularly use some form of social media, [FN1] and Facebook alone has about 550 million active members. [FN2] Other social networking sites have similarly grown exponentially. [FN3] Many users of these popular sites catalogue their lives with surprising honesty and detail, without regard for the possible legal ramifications of their posts.

Yet attorneys are only now starting to realize the importance of social media during discovery, or when advising clients of document-preservation duties. Perhaps this is because attorneys shy away from social networking more than others, [FN4] or maybe they believe they can discover needed evidence from more traditional sources. But paper traits are increasingly rare, and email is less relevant by the day. In 2010, most people between the ages 12 and 54 used email less frequently than the year before; Boston College even stopped issuing email accounts to incoming freshmen. [FN5]

For three essential reasons, Arizona attorneys should incorporate social media sources into their discovery planning and advising.

First, courts are increasingly recognizing the relevance of social media profiles, postings and other materials as evidence. Social media already has been used in a wide range of litigation, including personal injury, family law, insurance defense, labor and employment, contract disputes, intellectual property and criminal prosecutions. The Florida Character and Fitness Commission has even started to investigate the social media profiles of bar applicants. [FN6] According to one consulting firm, by 2013, nearly half of all U.S. companies will be asked to produce social media

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[2]

materials in discovery. [FN7]

Second, the discovery of social media raises a host of ethical issues that have not been fully settled by rule changes or ethics opinions. Indeed, technology and social customs are outpacing the law in this area like never before. A few bar organizations have ventured opinions in this area, and Arizona attorneys should be cognizant of those opinions and of how analogous Arizona ethical rules and other opinions (such as those involving metadata mining) might be applied to different social media scenarios.

Third, evolving standards regarding the preservation, disclosure and discovery of electronically stored information, or "ESI," will inevitably be held to apply to relevant social media materials within a party's possession, custody or control. For example, Arizona Rule of **Civil Procedure** 26.1(a)(8) requires the early disclosure of "[t]he existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial." Rule 34(a) permits a party to serve on another party a request "to inspect, copy, test or sample any designated documents or electronically stored information" in the opposing party's "possession, custody or control." Rule 26, in turn, affords a broad right of discovery applying to "any matter, not privileged, which is relevant to the subject involved in the pending action," even inadmissible materials that "appear[] reasonably calculated to lead to the discovery of admissible evidence." As individuals and companies increasingly disseminate information over social media networks, the full gamut of e-discovery obligations will come to apply to such materials.

The Relevance of Social Media Discovery

In many cases, particularly where a party's physical condition, mental state or lifestyle is at issue, the relevance of social media is clear, and courts have not hesitated to permit broad discovery of such information. In *EEOC v. Simply Storage Management*, [FN8] for example, a sexual harassment case where claimants alleged extreme emotional distress, the court observed:

> It is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant. [FN9]

The court allowed discovery into claimants' Facebook and MySpace "profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social network site] applications [for the relevant period] that reveal, refer, or relate to any emotion, feeling, or mental state," as well as communications that refer to events that "could reasonably be expected to produce a significant emotion, feeling, or mental state." [FN10] The court ordered such discovery regardless of whether these materials were designated "private" by claimants on their Facebook and MySpace accounts, reasoning that a basic protective order would suffice to address any privacy concerns. The court also ordered discovery of photos and videos that

related to claimant's emotions, feelings and mental states.

Similarly, a family court permitted a father to use the mother's MySpace writings to establish her sado-masochism, bisexuality, pagan tendencies and illicit drug use to help win custody of his child. [FN11] In a personal injury case, a defendant relied on plaintiff's smiling Facebook photos to refute allegations that her injuries confined her to her house and bed. [FN12] In an Arizona criminal case, the government used defendant's MySpace profile to prove his Internet usage and alcohol consumption in violation of his probation. [FN13] Courts, however, have held that pure fishing expeditions are not permitted, and have required a preliminary showing of relevance before ordering broad social media discovery. [FN14]

Of course, parties do not always agree on relevance. To resolve one such dispute, a Tennessee magistrate offered to create a Facebook profile and "friend" two third-parties whose accounts had been subpoenaed. [FN15] The magistrate promised to review and disseminate any relevant information to the parties and promptly close the account.

Obtaining Social Media Evidence Via Formal Discovery

Email, instant messaging and text messages have paved the way for the discovery of social media, and courts have largely treated discovery disputes involving social media the same as other e-discovery matters. Accordingly, obtaining social media via requests for production is relatively straightforward, and it avoids the legal hurdles and ethical issues involved in third-party subpoenas and informal discovery tactics.

One easy method of including social media in discovery requests is to add social media accounts or profiles to the (often boilerplate) definition of "document" in such requests. While at least one court has construed "profile" broadly, [FN16] it may be better to include expressly all postings, profiles, walls, comments, pictures, videos, blogs, messages and other sources of social media information likely to contain relevant information. In *Simply Storage Management*, the court reproduced the requests at issue, and those requests provide a helpful model. [FN17] When formulating requests for production, attorneys should be mindful of the capabilities and structure of various social media platforms, and may need to tailor their requests accordingly.

Subpoenaing information from a website is more problematic, for a few reasons.

First, the social media website might fight the subpoena to protect the privacy interests of its users. [FN18] Second, federal law imposes obstacles to access. A California district court, for example, has held that the federal Stored Communications Act applies to messages exchanged over Facebook and MySpace social networks. [FN19] The court found that these websites were providers of communication services within the meaning of the Act, and were prohibited from divulging private communications without the user's consent. Granting a motion to quash in part, the court remanded for a determination of the plaintiffs profile privacy settings: To the extent that plaintiff's Facebook "wall" and MySpace "comments" were not closed to the public, those portions of the accounts fell beyond the protections of the Act. [FN20]

Outside the subpoena context, however, privacy settings generally do not prevent discovery of social media. As one court has explained:

> [W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist .... [I]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking. [FN21]

On Facebook, for example, the most "private" setting is "friends only." Yet the average Facebook user has 130 "friends," [FN22] who could share posted information with their "friends," and "friends" of "friends," on so on. Nevertheless, social media users tend to post highly personal, and oftentimes embarrassing, information. To alleviate these concerns, protective orders are routinely entered. [FN23]

Informal Discovery Tactics and Ethical Issues

There are a number of ways to view social media profiles without engaging in formal discovery. For instance, Google indexes the public pages of social media sites, including Facebook, so a simple Google search might work. [FN24] Certain sites, like Linked In, allow greater access to profiles, regardless of "friend" status, simply by joining the network.

The State Bar of Arizona's Committee on the Rules of Professional Conduct has not yet issued any opinions that touch on the discovery of social media, but the Committee has stated that Arizona's Ethical Rules apply fully to online conduct. [FN25] Other jurisdictions' ethics committees have tackled some of these issues. Unsurprisingly, an attorney may freely access any public portions of the social media profiles of an adverse party. [FN26] At the other end of the spectrum, an attorney may not "friend" a represented adverse party any more than he or she may communicate with such a party in the "real" world. [FN27]

Whether an attorney may "friend" a witness or an unrepresented party--or direct another to do so on his or her behalf--is less clear. The New York City Bar, for example, has opined that an attorney may engage in the truthful, non-deceptive "friending" of unrepresented persons, "without also disclosing the reasons for making the request." [FN28] The New York City Bar endorses this approach so long as the lawyer or agent does not engage "in the direct or indirect use of affirmatively 'deceptive' behavior" to "friend" the witness, such as creating a fraudulent profile that falsely portrays the lawyer or agent as a long-lost classmate, a prospective employer or a friend of a friend. [FN29]

In contrast, the Philadelphia Bar Association Professional Guidance Committee has declared that an attorney may not "friend," directly or via an agent, an unrepresented person whom the other side intends to call as witness without revealing that the lawyer is seeking information for possible use

antagonistic to the witness. [FN30] The committee reasoned that the omission of the attorney's intent to obtain impeachment information from the witness's social media accounts would be deceptive and violate Ethical Rules 4.1 and 8.4. The committee found it of no significance that the witness grants "friend requests" as a matter of course and therefore exposes herself to such risks.

The honest "friending" of an unrepresented witness or party, with full disclosure of the purpose for the "friend" request, arguably would not violate Arizona's Ethical Rules, which are analogous to those of New York and Pennsylvania. [FN31] Nevertheless, the more conservative approach may be to avoid such practices until clearer standards are developed in Arizona, and especially given Ethical Rule 4.3's concern with misunderstandings that can arise when a lawyer interacts with an unrepresented person. Indeed, such concerns are all the more significant in the "online" world, where individuals are more prone to part with private or personal information. As even the New York City Bar Opinion acknowledges:

> The potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web .... For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious views and date of birth, and review the witness's personal diary, the witness would almost certainly slam the door shut and perhaps even call the police. [¶] In contrast, in the "virtual" world, the same stranger is more likely to be able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the foregoing information. [FN32]

In any event, it may also make sense to exercise caution because the State Bar of Arizona's Committee on the Rules of Professional Conduct has imposed stricter obligations than those set forth by other jurisdictions in related contexts. The Committee's 2007 Opinion on metadata, for example, expressly declined to follow less stringent opinions by the District of Columbia and American Bar Associations. [FN33] In that opinion, the Committee declared that an attorney who receives an electronic communication from another party, and who discovers embedded metadata that the attorney knows or has reason to know reveals confidential or privileged information, must notify the sender and refrain from reviewing the metadata. The Committee might similarly disfavor any furtive attempt to mine social media for evidence.

Preservation of Social Media ESI

Just like other forms of electronically stored information, social media materials may need to be preserved for potential disclosure or discovery if those materials contain relevant information. In a series of widely followed opinions issued in *Zubulake v. UBS Warburg LLC*, Judge Shira A. Scheindlin of the Southern District of New York held that a party's duty to preserve evidence extends to all ESI that a party knows, or reasonably should know, is relevant to the subject matter of the litigation. [FN34] Arizona's initial disclosure and discovery rules expressly include relevant ESI, and are also broad in scope. [FN35] Consequently, a party's duty to preserve ESI in Arizona likely will include all relevant social media records within a party's possession, custody or control, and social

media may need to be added to litigation-hold or document-preservation notices in appropriate cases.

The preservation of social media materials may present unique challenges, however. Websites like Facebook and Twitter are dynamic; users constantly add and delete content. For parties with the financial resources, companies like Iterasi and Smarsh offer programs to preserve and capture web pages, including social media sites. Less expensive software, such as Adobe Acrobat, can capture web pages and preserve them in static format. Facebook even has a "download your information" tool that creates a "zip" file of photos, videos, "wall" posts, messages, friend lists and other personal content shared with Facebook. Users can also print specific pages from their web browser. Most of these preservation methods, however, create only a snapshot of a website at a specific point in time. Nevertheless, at least one court has ordered a litigant to consent to the disclosure, by her social media providers (Facebook and MySpace), of all current, archived and deleted web pages. [FN36]

Although Judge Scheindlin made clear that discovery obligations reach the ESI of "key players" in a dispute, [FN37] courts have yet to address whether a business has "control" over the social media of "key player" employees. If a company's IT policy states that the business owns everything created, stored, sent or received on company equipment, for example, then a court might find that the company arguably owns--and therefore controls--any social media created by an employee at work or on a company computer. Although less likely, a business that can gain access to an employee's social media profiles, by, for example, compelling the employee to divulge log-in information, might also have sufficient ability to access those records to be in "control" of them.

The laws of employee privacy and social media are far from settled, however, and a finding of "control" might not be reached so easily. In all events, if a key player has been communicating with others about the subject matter of the dispute, courts may take a dim view of purposeful attempts to circumvent discovery obligations by conducting those communications through networks that are not directly within the physical control of a party.

Authentication of Social Media Evidence

Once social media records have been identified as relevant, preserved and produced, the authentication of those records is unlikely to present novel evidentiary issues (unless it is the judge who is the producing party [FN38]). In *Arizona v. Pressley*, for example, the Arizona Court of Appeals upheld the admission of photographs of the defendant taken from MySpace profiles. [FN39] The court noted the general rule that, to be admissible, a photograph must be "a reasonably faithful representation of the object depicted and must also aid the trier of fact in understanding the testimony or evaluating the issues." The court held that the testimony of defendant's wife vouching for the accuracy of the photos was sufficient to admit them. Other evidentiary principles, such as the ban on hearsay, the best evidence rule and Rule 403's balancing, should all apply to social media records as they would to any other document.

Conclusion

This article addresses only a few of the impacts that the advent of social media has had, or likely will have, on discovery practices in Arizona. Social media is changing the practice of law in myriad other ways. For instance, social media already has been used during *voir dire* as attorneys look for reasons to disqualify potential jurors. Even jurors themselves have caused stirs by "tweeting" during trial. [FN40] Amid all of the changes ushered in by new technologies that affect how people communicate and share information, one thing is certain: To remain effective advocates and counselors, attorneys must remain informed about the evolving legal implications of social media.

[FNa1]. **PETER S. KOZINETS** and **AARON J. LOCKWOOD** practice media, intellectual property and commercial litigation at Steptoe & Johnson LIP in Phoenix.

[FN1]. Jordan McCollum, "Over 80% of Americans Use Social Media Monthly," *MarketingPilgrim.com*, Aug. 25, 2009, www.marketing-pilgrim.com/2009/08/over-80-of-americans-use-social-media-monthly.html.

[FN2]. Lev Grossman, "Mark Zuckerberg," Time.com, Dec. 15, 2010 ("Person of the Year" profile), www.time.com/time/specials/packages/articlc/0,28804,2036683_2037183_ 2037185,00.html.

Facebook itself reports "more than 500 million" active users. www.facebook.com/prcss/info.php?statistics. And in January 2011, Goldman Sachs, in a document seeking to encourage investment in the social media site, claimed Facebook had "600 million+ monthly active users." www.msnbc.msn.com/ id/40929239/ns/technolo-gy_and_science-tech_and_gadgets/

[FN3]. According to LinkedIn, on average, more than one new member joins every second, and a million join every week. http://press.linkedin.com/about/ (last visited June 19, 2011).

[FN4]. American Bar Association, *Legal Technology Survey Report* (2010) (noting that just over half of lawyers personally maintain a presence in an online community or social networking site), www2.american-bar.org/publishing/bookbriefsblog/Lists/Posts/Post.aspx?ID=161.

[FN5]. Jorge Cino, "Email Use Declines 59% Among Teens ... Can Messages Surge?" *AllFacebook.com*, Feb. 8, 2011, www.allfacebook.com/email-use-declines-59-among-teens-can-mes-sages-surge-2011-02; Jeff Young, "Boston College Will Stop Offering New Students E-Mail Accounts," *Chronicle of Higher Education*, Nov. 19, 2008, http://chronicle.com/blogs/wiredcam-pus/boston-college-will-stop-offering-new-students-e-mail-accounts/4390.

[FN6]. Jan Pudlow, "On Facebook? FBBE may be planning a visit," FLA. BAR NEWS, Sept. 1, 2009, http:// ww.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/d2883558

44fc8c7285257619006522327 OpenDocument.

[FN7]. Gartner, Inc. press release published at www.efytimes.com/e1/58912/fullnews.htm (last visited June 19, 2011).

[FN8]. *EEOC v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430 (S.D. Ind. 2010).

[FN9]. *Id.* at 435.

[FN10]. *Id.* at 436.

[FN11]. *Dexter v. Dexter*, 2007 WL 1532084, 6 (Ohio App. May 25, 2007).

[FN12]. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 654 (N.Y. Sup. 2010).

[FN13]. *Arizona v. Pressley*, 2009 WL 2343139, *3 (Ariz. App. 2009) (non-precedential mem. disp.).

[FN14]. *McCann v. Harleysville Ins. Co. of N.Y.*, 910 N.Y.S.2d 614, 615 (2010); *Munis v. United Parcel Service, Inc.*, 2011 WL 311374, *8 (N.D. Cal. 2011).

[FN15]. *Barnes v. CUS Nashville, LLC*, 2010 WL 2265668, *1 (M.D. Tenn. June 3, 2010).

[FN16]. *Simply Storage Mgmt., LLC*, 270 F.R.D. at 432 n.1.

[FN17]. *Id.* at 432.

[FN18]. *E.g.*, John Schwartz, *Twitter Fighting Pennsylvania Subpoena Seeking Names of 2 Tweeters*, N.Y. TIMES, May 20, 2010, www.nytimes.com/2010/05/21/technology/21twitter.html?_r=1&dbk.

[FN19]. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 971-72, 982 (CD. Cat. 2010).

[FN20]. *Id.* at 982.

[FN21]. *Romano*, 907 N.Y.S.2d at 657 (quotations omitted).

[FN22]. Facebook's "Press Room," http://www.facebook.com/press/info.php? statistics.

[FN23]. *E.g., Simply Storage Mgmt., LLC*, 270 F.R.D. at 434; *Ledbetter v. Wal-Mart Stores, Inc.*, 2009 WL 1067018 (D. Colo. April 21, 2009).

[FN24]. *E.g.*, Marshall Kirkpatrick, *Facebook Will Be Google-able (If Your Profile is Set to Public)*,

ReadWriteWeb.com, Dec. 7, 2009, www.readwriteweb.com/archives/facebook_will_be_googled_if_your_profile_is_set_ to.php.

[FN25]. Ariz. Formal Ethics Op. 1997-04 (April 1997).

[FN26]. *E.g.*, N.Y. Comm. on Prof'l Ethics, Op. 843 (Sept. 2010).

[FN27]. ARIZ.R.S.CT. 42, Ethical Rule 4.2 (Communication with Person Represented by Counsel).

[FN28]. N.Y. City Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2, "Obtaining Evidence from Social Networking Sites" (Sept. 2010).

[FN29]. *Id.*

[FN30]. Philadelphia Prof'l Guidance Comm., Op. 2009-02 (March 2009).

[FN31]. *E.g.*, ARIZ.R.S.CT. 42, Ethical Rules 4.1 (Truthfulness in Statements to Others), 4.3 (Dealing with Unrepresented Person) and 4.4 (Respect for Rights of Others).

[FN32]. N.Y. City Comm. on Prof'l & Judicial Ethics, Formal Op. 2010-2, "Obtaining Evidence from Social Networking Sites" (Sept. 2010).

[FN33]. Ariz. Formal Ethics Op. 2007-03 (Nov. 2007).

[FN34]. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003).

[FN35]. ARIZ.R.CIV.P. 26.1(a)(8); 34(a).

[FN36]. *Romano*, 907 N.Y.S.2d at 657.

[FN37]. *Zubulake*, 220 F.R.D. at 218.

[FN38]. *Barnes*, 2010 WL 2265668 at *].

[FN39]. *Pressley*, 2009 WL 2343139 at *3.

[FN40]. *E.g.*, Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, Law.com, Feb. 15, 2011, www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202481944364&slreturn=1&hbxlogin=1.

Jennifer A. Cranston, Expert Discovery 47 Arizona Attorney 38 (March, 2011)

Pursuant to recent changes in the Federal Rules of Civil Procedure, draft expert reports and communications between attorneys and their retained experts are now considered attorney work product and, therefore, presumptively undiscoverable. So, if you are a civil litigator in federal court, gone are the days of worrying about the discovery of strategy sessions with your experts and spending countless hours and client dollars fighting over who really drafted the expert's opinion.

Or are those days truly gone? After years of investigation and analysis of perceived problems with expert discovery under Rule 26 of the Federal Rules, the Advisory Committee on Federal Rules of Civil Procedure ("Advisory Committee") succeeded in revising the federal discovery rule in the hopes of refocusing civil litigators on the merits of expert opinions and away from the minutiae of attorney-expert collaboration. The revised rule, which became effective in December 2010, contains language that dramatically limits expert discovery. However, closer examination reveals terminology that may provide fodder for future discovery disputes and uncertainty regarding what is and is not discoverable.

Consequences and Failures of Unrestricted Expert Discovery

In 2006, the Advisory Committee began investigating concerns raised by the American Bar Association regarding the discovery of trial expert draft reports and communications with counsel. [FN1] Specifically, at that time, Rule 26(a)(2)(B) required the expert to disclose "data and other information considered by the witness" in forming his opinions. This language, which was added in 1993, had been interpreted by a number of federal courts to require disclosure of all draft reports and all communications between the expert and the attorney, even if those communications contain traditional attorney work product, such as trial strategy and mental impressions. [FN2]

In theory, the Advisory Committee acknowledged that this kind of expansive discovery should uncover the extent of an attorney's involvement in the formation of the expert's opinion and report and therefore assist the jury in distinguishing the truly independent experts from the "hired guns" who will opine to anything upon attorney demand. [FN3]

Unfortunately, the investigation revealed several undesirable results that did not comport with the justice-seeking intent of the rule.

Specifically, the Advisory Committee found that the fear of disclosure has led counsel and experts to "take elaborate steps to avoid creating any discoverable record." [FN4] Some attorneys habitually instruct experts to take no notes, create no record of preliminary analyses or opinions, and produce no draft reports. Other attorneys simply avoid practically all collaboration with their experts.

Both practices impede the effective use of experts by restricting communication between the attorney and expert, communications that most likely would lead to a better understanding of the

issues in the case and a more refined expert analysis. Another consequence of the federal courts' broad interpretation of Rule 26 (which is reflected in case law, though not specifically referenced by the Advisory Committee) is the increased risk of spoliation claims and sanction requests against attorneys who continue to collaborate with their experts but fail to retain all related documents and communications. [FN5]

Expansive expert discovery also creates additional litigation costs. First, many attorneys hire non-testifying "consulting" experts, whose files and communications with counsel remain undiscoverable. For those attorneys with clients who can afford to pay for two experts, the consulting expert provides the collaboration and feedback that the trial expert would provide but for the fear of discovery. Second, although many attorneys seek to limit discovery regarding their own experts, they simultaneously spend significant time and money trying to obtain the other side's draft reports and attorney-expert communications.

Perhaps the most damning information revealed in the Advisory Committee's investigation was the "pragmatic failure" to achieve any significant benefit from unrestricted expert discovery. [FN6] According to practitioners' reports, all the time and money spent trying to uncover evidence of attorney ghostwriting and expert impeachment material "failed to yield useful information in practice" because lawyers and experts developed the various above-referenced strategies to avoid the creation of any such material. [FN7]

Faced with these results, some attorneys began a practice of affirmatively stipulating to exclude from discovery expert drafts and counsel communications. Similarly, at least one state--New Jersey--expressly modified its discovery rule to limit discovery of such reports and communications. [FN8] Attorneys practicing under the New Jersey rule, as well as those who voluntarily stipulate to exclude drafts and expert communications from discovery, unanimously reported to the Advisory Committee their belief that the limited discovery achieved better and more cost-effective results. [FN9]

Revising Federal Rule 26

In light of its investigative findings, in 2008 the Advisory Committee drafted proposed revisions to Rule 26. The goal of the revisions was to remedy the problems created by the 1993 version of the rule, without prohibiting discovery of legitimate expert issues such as the foundations and merits of expert opinions. [FN10] Meeting minutes and reports of the Advisory Committee reflect significant debate and analysis regarding the appropriate language and scope of the revisions. [FN11]

One of the primary issues discussed was the most effective way to investigate whether an expert's opinions were unduly influenced by the attorney who retained him. Some argued that review of draft reports and all communications was the best method. However, the Advisory Committee ultimately determined that the focus on the expert report and the drafting thereof is misguided because the report is only intended to apprise the opposition of the expert's anticipated testimony; it is not independent evidence. [FN12] Therefore, whether an attorney had a large or small role in

drafting the report and communicating with the expert about his opinion is much less important than whether the expert's report and testimony truly reflect the expert's analysis and conclusions. [FN13]

In June 2008, the proposed amendments were published and distributed for public comment. [FN14] They received positive responses from most, including the ABA, the American College of Trial Lawyers, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, and the Department of Justice. [FN15] The primary opposition to the amendments came from a group of professors who were concerned that the work product protection of draft reports and attorney-expert communications would reinforce the perception of experts as hired guns and would result in the concealment of significant amounts of relevant information. [FN16] The Advisory Committee respectfully disagreed with these criticisms by pointing out that (1) it is common knowledge that retained experts are paid to testify and (2) significant amounts of information were left undiscovered under the 1993 rule because of attorney and expert efforts to avoid creating any discoverable materials. [FN17]

In 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved the Advisory Committee's recommended amendments to Rule 26 and submitted them for consideration to the U.S. Supreme Court. [FN18] The amendments were approved by the Supreme Court in 2010 and became effective on December 1. The three key revisions are:

- **Rule 26(a)(2)(B):** The requirement that testifying experts provide the "data and other information considered" in forming their opinions was rewritten to require the disclosure of "facts or data considered." According to the Advisory Committee Notes, the intent of this revision is to limit disclosure to "material of a factual nature" and thereby exclude from disclosure "theories or mental impressions of counsel." The revision retained the term "considered" in order to include factual material that was considered by the expert even though not relied upon.

- **Rule 26(b)(4)(B):** This is a new subsection that reads: "*Trial Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded." The Advisory Committee Notes explain that the protection is intended to apply to written and electronic drafts.

- **Rule 26(b)(4)(C):** This is also a new subsection, providing work product status to all communications between a party's attorney and retained expert, [FN19] except the following three categories of communications that:
  - relate to the expert's compensation;
  - identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed;" and
  - "identify assumptions that the party's attorney provided and that the expert relied upon

in forming the opinions to be expressed."

The Advisory Committee Notes provide further explanation of the intended application of these exceptions. For example, the second exception applies only to the communication in which the facts or data are identified; it does not allow discovery of "further communications about the potential relevance of the facts or data." Similarly, the third exception is limited to those assumptions actually relied on by the expert; as the Notes indicate, "More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts are outside this exception."

Finally, the Advisory Committee Notes point out that, like other attorney work product, draft reports and attorney-expert communications will remain subject to discovery under Rule 26(b)(3)(A)(ii), which authorizes courts to allow discovery if a party shows substantial need and the inability to obtain the substantial equivalent of the work product materials without undue hardship. However, the Notes state that it will be rare for a party to meet this standard, and the opposing party's "failure to provide required disclosures or discovery does not show the need or hardship" required.

Devil in the Details: Interpretation & Application

The Advisory Committee was cognizant of the need to use clear language in the revised rule; otherwise, the revisions would risk failure and additional, unnecessary litigation over the proper interpretation. [FN20] However, drafting rules with this kind of clarity is an extraordinarily difficult task, and not all potential pitfalls can be addressed. Accordingly, the following three hypothetical conflicts are presented for illustration purposes only; they are not intended to be a criticism of the Advisory Committee's work.

HYPOTHETICAL 1:

Assumptions considered but not relied upon

One source of potential conflict noted by members of the Advisory Committee is the language used in Rule 26(b)(4)(C) to describe the categories of attorney-expert communications that remain discoverable. [FN21] Specifically, the second category permits discovery of communications in which the attorney identifies "facts or data" that are "considered" by the expert, while the third category permits discovery of communications in which the attorney identifies "assumptions" that are actually "relied upon" by the expert.

The distinction between facts/data and assumptions is one that may be blurred in real-life practice. The same can be said of the line between consideration and reliance. Attorneys who wish to avoid discovery will try to characterize their communications as identifying assumptions that were considered by the expert but not relied upon.

For example, a savvy attorney could brief his expert about the case using hypothetical assumptions and then instruct the expert to rely upon only those that produce a favorable expert

opinion, thereby shielding from discovery all the other "assumptions" that were not relied upon. This strategy would be particularly available to an attorney who has access to factual information about the case that may be harmful to his position but not subject to a standard discovery request from opposing counsel. Because the federal disclosure rules do not require a party to disclose unfavorable information, Rule 26(b)(4)(C) arguably provides a mechanism for advocates to explore potentially negative facts with their experts and simultaneously conceal them from the other side.

HYPOTHETICAL 2:

Attorney input transmitted via draft report

The interplay between Rules 26(b)(4)(B) and 26(b)(4)(C) provides a breeding ground for another potential area of discovery disputes. The former deems all draft reports, including electronic versions, to be work product and therefore presumptively undiscoverable. The latter, as discussed previously, permits discovery of certain attorney-expert communications. The potential conflict arises when the arguably discoverable communication occurs in the exchange of a draft report.

For example, it is common practice in preparing a report or disclosure to send electronic versions back and forth between attorney and expert and include comments and suggestions regarding the content of the document in the draft itself. Does an otherwise discoverable communication in which the attorney identified facts to be considered or assumptions to be relied upon by the expert become undiscoverable because the communication is embedded in a draft report?

The answer to this question obviously has an impact on a variety of practical and strategic decisions, including whether and how drafts are preserved. Unfortunately, none of the Advisory Committee's meeting minutes, reports or Notes provide insight into this potential conflict.

HYPOTHETICAL 3:

Undiscoverable but admissible evidence

Finally, in drafting the revised rule, the Advisory Committee struggled with the distinction between discovery and evidentiary rules. In the initial version of the amendments distributed for comment in 2008, the Advisory Committee Notes included an express expectation that the new work product limitations would "ordinarily be honored at trial." [FN22] However, during the comment period a number of respondents argued that this statement attempted to create an evidentiary privilege, which can be accomplished only by an affirmative act of Congress. [FN23] Accordingly, the Advisory Committee revised the Notes to eliminate the statement at issue and instead stress that there is no intent to infringe on the trial court's evidentiary jurisdiction. [FN24]

Yet, the tension between what is discoverable and what is admissible will continue. As the Advisory Committee materials make clear, though counsel will not be allowed to specifically ask

about the opposing counsel's role in preparing the expert's report, nothing prohibits the expert from testifying to counsel's role. [FN25]

For example, at a deposition, plaintiff's counsel could ask permissible questions regarding how the defense expert formed his opinion and why he failed to consider alternative theories. In response, the expert could volunteer information about conversations with defense counsel regarding undiscoverable hypotheticals. When trial comes around, whether the expert's response is admissible is an evidentiary issue for the trial court, which may or may not be influenced by the new Rule 26 discovery restrictions.

Such disclosures typically are not a problem with attorney work product because attorneys are not witnesses. But the possibility of inadvertent disclosure by expert testimony and the additional doors such disclosure could open may become a significant issue in future litigation.

Conclusion

The recently revised Federal Rule 26 seems to take a significant step toward remedying the problems created by unrestricted expert discovery. And it certainly instills hope that civil litigators in federal court will feel a greater sense of comfort in freely communicating with their experts and focusing their attention on the merits of opposing expert opinions.

Yet, as a practical matter, it is entirely likely that future discovery disputes will arise over the interpretation and application of the new rule. Likewise, some advocates will not be deterred from continuing their search for evidence of the bought-and-paid-for expert opinion. Overall, as with most changes in the law (and life), time will be the best judge of whether the new Rule 26 achieves its goal of reducing discovery costs--including elaborate discovery avoidance techniques--without sacrificing access to information that is required for the adversary system to function properly.

KEY REVISIONS TO RULE 26, FRCP

Disclosure of Expert Testimony **Rule 26 (a)(2)(B)**

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or

by deposition within the preceding four years.

Trial Preparation: Experts **Rule 26 (b)(4)(B)-(C)**

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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[FN1]. Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (June 2006). All Committee Meeting Minutes and Reports are available online at www.uscourts.gov.

[FN2]. *See, e.g.*, *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 28-29 (W.D.N.Y. 2002) (citing the agreement between the "overwhelming majority of district courts in this Circuit as well as in other jurisdictions" that Rule 26(a)(2)(B) requires disclosure of all documents and information provided to a testifying expert even if the expert did not rely on the materials in forming his opinion and regardless of whether the materials would be otherwise protected as ordinary or core attorney work product); *South Yuba River Citizen's League v. Nat'l Marine Fisheries Serv.*, 257 F.R.D. 607, 615 (E.D. Cal. 2009) (adopting interpretation of Rule 26 requiring disclosure of all expert drafts). *See also* ABA Recommendation No. 120A (August 2006) (reviewing federal case law interpreting expert disclosure obligations).

[FN3]. Advisory Committee, Report to Standing Committee (June 2008) ("June 2008 Standing Committee Report").

[FN4]. Committee on Rules of Practice and Procedure, Report of the Judicial Conference (September 2009) ("September 2009 Judicial Conference Report").

[FN5]. *See, e.g.*, *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001) (analyzing

spoliation claims arising from failure to retain and produce draft expert reports and communications); *Jama v. Esmor Correctional Serv.*, 2007 U.S. Dist. LEXIS 45706 (D.N.J. 2007) (granting request for attorneys' fees as sanction for failure to produce expert documents and communications); *University of Pittsburgh v. Townsend*, 2007 U.S. Dist. LEXIS 24620 (E.D. Tenn. 2007) (finding violation of obligation to preserve and disclose communications with expert, but declining to grant sanction request).

[FN6]. June 2008 Standing Committee Report, *supra* note 3.

[FN7]. *Id.*

[FN8]. R. 4:10-2, *N.J. Court Rules*.

[FN9]. June 2008 Standing Committee Report, *supra* note 3.

[FN10]. Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (January 2009) ("January 2009 Standing Committee Meeting Minutes").

[FN11]. *See* Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (January 2008); Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (June 2008) ("June 2008 Standing Committee Meeting Minutes"); June 2008 Standing Committee Report, *supra* note 3.

[FN12]. June 2008 Standing Committee Meeting Minutes, *supra* note 3.

[FN13]. *Id.*

[FN14]. January 2009 Standing Committee Meeting Minutes, *supra* note 10.

[FN15]. Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (June 2009).

[FN16]. January 2009 Standing Committee Meeting Minutes, *supra* note 10.

[FN17]. *Id.*

[FN18]. September 2009 Judicial Conference Report, *supra* note 4; Judicial Conference, Report to Hon. John G. Roberts, Chief Justice of the United States (December 2009).

[FN19]. The work product protection under this new provision only applies to retained expert witnesses. Under another revision, which added Rule 26(a)(2)(C), experts who are not retained or specifically employed to provide testimony (such as treating physicians or fact witnesses who also qualify as experts) are not required to prepare a report and counsel's communications with them are

not protected work product.

[FN20]. June 2008 Standing Committee Meeting Minutes, *supra* note 11.

[FN21]. *Id.*

[FN22]. June 2008 Standing Committee Report, *supra* note 3.

[FN23]. January 2009 Standing Committee Meeting Minutes, *supra* note 10.

[FN24]. *Compare* June 2008 Standing Committee Report, *supra* note 3 *with* September 2009 Judicial Conference Report, *supra* note 4.

[FN25]. *See* June 2008 Standing Committee Meeting Minutes, *supra* note 10 (expert may not be asked whether the attorney who retained him helped write the report or made changes to it); June 2008 Standing Committee Report, *supra* note 3 (rule does not regulate expert's answers; "If the expert is asked why a particular theory was not explored, for example, the expert is free to answer 'because my lawyer told me not to,' or 'because my lawyer directed me to explore only the theory that supports my opinion.'").

Mark E. Lassiter, Arizona's New Revised Uniform Arbitration Act 47 Arizona Attorney 30 (November, 2010)

On April 23, 2010, Arizona Gov. Jan Brewer signed into law HB2430, Arizona's adaptation of the Revised Uniform Arbitration Act (the RUAA) [FN1]--the most sweeping reform of Arizona arbitration law in almost a half century.

Thus culminated nine years of effort by the State Bar of Arizona and its Alternative Dispute Resolution (ADR) Section members to bring Arizona's arbitration statutes into the 21st century and conform them to modern arbitration trends, industry practices and significant court decisions during the last 48 years.

With its passage, Arizona becomes the 14th state (together with the District of Columbia) to adopt the RUAA, [FN2] a "uniform law" adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2000. Generally, the RUAA revises NCCUSL's Uniform Arbitration Act (UAA) of 1956, adopted in 49 jurisdictions. Arizona substantially enacted the UAA in 1962 [FN3]--but that law was not thereafter significantly amended or modified until the recent passage of the RUAA.

"Arbitration" (also known as "commercial," "private" or "contract" arbitration) is the referral of a dispute to one or more persons (called "arbitrators") for a final and legally binding determination of the dispute (called an "award"), which may thereafter become the judgment of a civil court. Neither the RUAA nor the discussion in this article applies to so-called "judicial," "compulsory

[court] arbitration," or "court annexed," non-binding arbitration, such as that required by the Arizona Rules of **Civil Procedure**. [FN4] This article highlights the major and unique features of Arizona's RUAA, the Arizona case law that is now effectively "overruled" by it, and how it will change the landscape of Arizona arbitration law and practice in the future--for better or for worse.

When the RUAA Applies

When applicable, the RUAA resolves arbitration process ambiguities by statutorily "filling in the gaps" with statutory clarity about such things as definitions of arbitration terms, lawful arbitration agreement provisions, an arbitrator's duties and powers, court interaction with (and enforcement of) the arbitration proceeding, and the conversion of an arbitration award to a judgment in a court of law.

Procedurally, the RUAA applies to an "agreement to arbitrate" made on or after Jan. 1, 2011. [FN5] After January 1, the RUAA governs an agreement to arbitrate "whenever made," [FN6] so if Arizona arbitration law governs the parties' agreement to arbitrate, the RUAA will effectively "amend," by operation of law, all then existing agreements to arbitrate. The parties to an agreement to arbitrate or arbitration proceeding may agree that the RUAA applies to their dispute before Jan. 1, 2011, [FN7] if they do so in a "record," which is now defined in the RUAA along with other terms. [FN8]

Substantively, two additional factors affect whether the RUAA applies to any given agreement to arbitrate.

First, the RUAA applies when the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.--the "FAA") does not. Generally, the FAA applies to any "contract evidencing a transaction involving commerce," [FN9] which under interpretations of the United States Supreme Court makes the FAA applicable to virtually every kind of contract. Hence, if an agreement to arbitrate is silent as to which substantive arbitration law--the FAA, RUAA or UAA--applies, then the normal "default" is to the FAA. Lawyers desiring the RUAA to apply to their clients' agreements to arbitrate need to make this provision express, as the FAA has not been substantially updated since it was first adopted in 1925 and does not address many modern-day arbitration issues finally addressed in the RUAA.

Second, unlike any other jurisdiction that has adopted the RUAA, Arizona now has the unique distinction of having two different, simultaneously operative arbitration statutes: one, Arizona's old UAA, for disputes involving employment, insurance companies, national banking interests and self-regulating securities organizations [FN10]; and a second, the RUAA, for all other disputes.

This curious anomaly is the unique result of a Faustian compromise with the lobbyists for insurance companies, labor, national banks and national securities interests, who generally opposed passage of the RUAA in Arizona. After several years of unsuccessfully trying to pass the RUAA over these industries' various objections, it was decided to simply "carve them out" of the effects of the RUAA and to provide that they would continue to be governed by Arizona's old UAA. Generally, all of these "carved out" industries' disputes would be governed by the FAA anyway--assuming the

absence of a specific provision requiring Arizona's UAA to govern any of their agreements to arbitrate, which this author has never seen.

Hence, instead of having a normal state of affairs whereby the "new-and-improved" RUAA simply replaced the old UAA altogether, Arizona now has a surreal "two-headed giant" for its arbitration scheme. This brings to mind Otto von Bismarck's famous quote: "Laws are like sausages; it is better not to see them being made."

The effect of this schizophrenic state of affairs is that the RUAA effectively overrules several existing Arizona state court arbitration appellate decisions for most arbitrable disputes, but not for those "carved out" from its effect. What's more, in adopting the RUAA the Arizona Legislature effectively found that certain provisions in agreements to arbitrate are unwaivable before a dispute arises--essentially finding that pre-dispute waivers of these "unwaivable" provisions are unconscionable. [FN11] However, nothing on the face of Arizona's old UAA prevents such pre-dispute waivers of these otherwise "unwaivable" provisions.

This is sure to wreak havoc on the "reasonable expectations" of consumers and generate a lot of litigation in the future about the enforceability of agreements to arbitrate involving such "carved out" disputes.

Interim Remedies [FN12]

One of the historically difficult areas of arbitration law and practice is the ability of parties to an arbitration proceeding to obtain quick, emergency relief (e.g., an injunction or a provisional remedy). Generally, an arbitration proceeding is a poor forum for such relief, even where the parties' agreement to arbitrate expressly empowers the arbitrator to grant such remedies. [FN13]

The RUAA now provides, "The arbitrator may issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding ... to the same extent and under the same conditions as if the controversy were the subject of a civil action." [FN14] Before an arbitrator is appointed and is authorized and able to act, the court, for good cause shown, may enter an order for interim remedies if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy. [FN15]

If an arbitrator makes a pre-award ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award and then make a motion to the court for an expedited order to confirm the award, in which case the court shall summarily decide the motion and issue an order to confirm the award unless the court otherwise vacates, modifies or corrects the award. [FN16] A party does not waive its right to arbitrate by asking the court to grant such interim remedies in a matter otherwise subject to arbitration, [FN17] which effectively statutorily overrules (in non-"carved out" disputes) the Arizona Supreme Court decision in *Bolo Corp. v. Homes & Son Const. Co.*, [FN18] wherein the court held:

When this plaintiff sought redress through the courts [seeking a pre-judgment provisional remedy], in lieu of the arbitration tribunal, and asked the court for exactly the same type of relief (i.e. damages), which an arbitrator is empowered to grant, it waived the right to thereafter arbitrate the controversy over the protest of the defendant.

Consolidation of Separate Arbitration Proceedings [FN19]

Another contemporary problem area in modern arbitration practice lies in the consolidation of separate arbitration proceedings, which typically arises in Arizona in large and complex construction defect disputes.

The RUAA now provides that the court may order consolidation of separate arbitration proceedings as to all or some of the claims under certain circumstances (generally, the same circumstances as those under which a court could consolidate separate court proceedings). [FN20] One notable exception, however, is that the court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation, [FN21] which may make passage of this provision a "Pyrrhic victory" at best, because many arbitration agreements (e.g., the American Institute of Architects construction contracts) routinely prohibit consolidation of certain parties or claims.

However, if a court finds that contractual provisions prohibiting consolidation were, say, unconscionable or violative of the "reasonable expectations" of the parties and strikes them from the parties' agreement to arbitrate, [FN22] then a court could thereafter order consolidation, which would serve the purposes of both judicial and arbitral economy in many cases.

The General Requirement of Neutral Arbitrators [FN23]

A.R.S. § 12-3011(B) provides, "An individual who has a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party may not serve as an arbitrator required by an agreement to be neutral." This RUAA provision essentially codifies the American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, approved by the American Bar Association House of Delegates on Feb. 9, 2004, which provides, "This Code establishes a presumption of neutrality for all arbitrators, including party appointed arbitrators, which applies unless the parties' agreement, the arbitration rules agreed to by the parties or applicable laws provide otherwise."

However, until the RUAA the "presumption" of an arbitrator's neutrality was only established by the rules of procedure of various arbitration organizations (e.g., the American Arbitration Association--the AAA) [FN24] or non-binding "codes of conduct" like the one above. Under the RUAA (but not the UAA), neutrality is now expressly the legal norm.
]

Mandatory Disclosures by Arbitrators [FN25]

Consistent with the general requirement for neutral arbitrators:

> Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate, to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including both: (1) A financial or personal interest in the outcome of the arbitration proceeding [and] (2) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, a witness or another arbitrator. [FN26]

This is a continuing duty of an arbitrator throughout the arbitration proceeding. [FN27] Again, though this "disclosure" practice has been common under current arbitration organization industry practice, it was not codified until enacted by the RUAA. If a party timely objects to either the appointment or continued service of the arbitrator based on a fact disclosed by the prospective arbitrator, or an arbitrator's failure to disclose a required fact, then the objection may be a ground under A.R.S.§ 12-3023(A)(2) for vacating the arbitrator's award. [FN28] An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party is presumed to act with evident partiality under A.R.S.§ 12-3023(A)(2), which would likely result in vacatur of the arbitrator's award.

Immunity of Arbitrator [FN29]

Codifying existing Arizona Supreme Court case law, [FN30] the RUAA now expressly provides, "An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity." [FN31] Significantly, the failure of an arbitrator to make a required disclosure does not cause any loss of immunity. [FN32]

Arbitration Process and Discovery [FN33]

An arbitrator now has expanded statutory powers to conduct the arbitration proceeding, [FN34] including the rights (for the first time under any Arizona arbitration statute) to:

- Decide a request for "summary disposition" (e.g., a motion for summary judgment, a motion for judgment on the pleadings or a motion to dismiss for failure to state a claim for which relief can be granted) of a claim or issue [FN35];

- "Permit such discovery as the arbitrator decides is appropriate in the circumstances" [FN36];

• "Order a party to the arbitration proceeding to comply with the arbitrator's discovery related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding and take action against a non-complying party to the extent a court could if the controversy were the subject of a civil action in this state" [FN37]; and

• "Issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state." [FN38]

Remedies (Including Punitive Damages or Other Exemplary Relief) [FN39]

Although the United States Supreme Court has long allowed FAA arbitrators to award punitive damages in FAA arbitration proceedings (even where applicable state statutes prohibited them from so doing), [FN40] for the first time under any arbitration statute the RUAA now expressly provides, "An arbitrator may award punitive damages or other exemplary relief if such an award is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim." [FN41]

However, "If an arbitrator awards punitive damages or other exemplary relief under [A.R.S. § 12-3021 (a) then] the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief." [FN42] Collectively, these two subsections effectively adopt separate bases of judicial review, but only concerning punitive or exemplary damages. [FN43]

But A.R.S. §§ 12-2021(A) and (E) are even more restrictive than the federal "manifest disregard of the law" doctrine, which will nonetheless uphold an erroneous arbitration award as long as the arbitrator did not "recognize the applicable law and then ignore it"--a subjective standard. In Arizona, under the RUAA, an arbitrator is not even empowered to award punitive or exemplary damages unless such an award "is authorized by law in a civil action involving the same claim and the evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim," and "[i]f an arbitrator awards punitive damages or other exemplary relief ... the basis in fact justifying and the basis in law authorizing the award" is separately stated in the arbitration award--an objective standard for the courts to review. [FN44] An arbitrator that awards punitive damages or other exemplary relief without complying with these substantive and procedural requirements for doing so "exceeds the arbitrator's powers" under §§ 12-2021(A) and (E), which should result in a vacatur of the arbitrator's award under § 12-2023(A)(4) (permitting vacatur of an arbitrator's award where "[a]n arbitrator exceeded the arbitrator's powers").

In light of §§ 12-2021(A) and (E), an interesting question arises as to whether Arizona's old UAA allowed arbitrators to award punitive or exemplary damages, since it is altogether silent on the issue of such damages. While no Arizona state court case has addressed the issue directly, past Arizona cases ordered to arbitration by the Arizona state courts impliedly suggest that arbitrators are

empowered to award punitive damages under the UAA. [FN45] Furthermore, most agreements to arbitrate incorporate arbitration organization rules that are broad enough to empower arbitrators to award punitive or exemplary damages. [FN46]

A.R.S. § 12-3021(C) provides, "As to all remedies other than [punitive damages and attorneys' fees], an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award ... or for vacating an award."

Attorneys' Fees and Costs and Expenses of Arbitration [FN47]

A.R.S. § 12-3021(B) provides, "An arbitrator may award reasonable attorney fees and other reasonable expenses of arbitration only if that award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding." This provision statutorily overrules (in non-"carve out" cases) *Canon School Dist. No. 50 v. W.E.S. Const. Co., Inc.*, [FN48] wherein the Arizona Supreme Court held that a party to an arbitration proceeding is not entitled to attorneys' fees incurred in the arbitration proceeding under § 12-341.01(A). Under the RUAA, such an award of attorneys' fees could now be made by the arbitrator. Likewise, "An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award." [FN49]

Scrivener's Error in the RUAA

Except for the "carve out" provisions of A.R.S. §§ 12-3003(B) and (C), Arizona's RUAA was supposed to mirror, word for word, the NCCUSL RUAA, except for non-substantive language to conform the RUAA to the style of other Arizona statutes (e.g., NCCUSL RUAA "Section 5(b)" might instead read "12-3005, SUBSECTION A" under Arizona's RUAA). NCCUSL RUAA Sections 5(a) and 6(a) were enacted as Arizona RUAA Sections 12-3005(A) and 12-3006(A), respectively.

The problem is that Arizona's RUAA Section 12-3004(B)(1), as enacted, should have read Sections "12-3005, SUBSECTION A, 12-3006, SUBSECTION A ..." Instead, it only read, "... 12-3005, 12-3006, ..." (omitting references to "SUBSECTION A"). These omissions are significant and need to be corrected as soon as possible. As of the writing of this article, the ADR Section has a request before the State Bar Board of Governors to authorize the sponsorship of legislation in the next legislative session to correct this scrivener's error in the RUAA.

Conclusion

Arizona's new RUAA will materially change the face of arbitration practice in Arizona. Lawyers and arbitrators handling arbitration proceedings in commercial, construction, employment, real estate and other common business disputes need to become familiar with it.

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[FN1]. The Act is now embodied in Title 12, Chapter 21, Article 1 of the Arizona Revised Statutes--A.R.S. §§ 12-3001 *et seq.*

[FN2]. Other jurisdictions adopting the RUAA include Alaska, Colorado, District of Columbia, Hawaii, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and Washington. *See* NCCUSL website: http://uniformlaws.net/Update/uniformact_factsheets/uniformacts-fs-aa.asp

[FN3]. As embodied in Title 12, Chapter 9, Article 1 of the Arizona Revised Statutes--A.R.S. § 12-1501 *et seq.*

[FN4]. *See, e.g.*, Rules 72-77 of the Arizona Rules of **Civil Procedure** regarding "Compulsory Arbitration" in Arizona civil courts.

[FN5]. A.R.S. § 12-3003(A)(1).

[FN6]. *Id.* § 12-3003(A)(3).

[FN7]. *Id.* § 12-3003(A)(2).

Curiously, because the RUAA does not take effect until Dec. 31, 2010, it is uncertain how this provision can be operative before that time, but that's what the Legislature intended.

[FN8]. *See generally* the "Definitions" in A.R.S. § 12-3001.

[FN9]. *See* 9 U.S.C. § 2.

[FN10]. A.R.S. §§ 12-3003(B) and (C).

[FN11]. *See generally* § 12-3004.

[FN12]. *See generally* § 12-3008.

[FN13]. *See, e.g.*, Rule 34 of the American Arbitration Association's Commercial Arbitration Rules Amended and Effective June 1, 2009 (the "AAA Rules").

[FN14]. A.R.S. § 12-3008(B)(1).

[FN15]. *Id.* §§ 12-3008(A) and (B)(2).

[FN16]. *Id.* §§ 12-3018 and 12-3022.

[FN17]. *Id.* § 12-3008(C).

[FN18]. 464 P.2d 788 (Ariz. 1970).

[FN19]. A.R.S. § 12-3010.

[FN20]. *See generally id.* § 12-3010(A).

[FN21]. Id. § 12-3010(C).

[FN22]. *See, e.g., id.* § 12-3006(A), which provides: "A. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable *except on a ground that exists at law or in equity for the revocation of a contract.*" (Emphasis added.)

[FN23]. A.R.S. § 12-3011.

[FN24]. *See, e.g.*, AAA Rule R-17, which provides:

> "Disqualification of Arbitrator. (a) Any arbitrator *shall be impartial and independent* and shall perform his or her duties with diligence and in good faith, and *shall be subject to disqualification for: (i) partiality or lack of independence*." (Emphasis added.)

[FN25]. A.R.S. § 12-3012.

[FN26]. *Id.* § 12-3012(A).

[FN27]. *Id.* § 12-3012(B).

[FN28]. *Id.* §§ 12-3012(C) and (D).

[FN29]. *Id.* § 12-3014.

[FN30]. *See* *Craviolini v. Scholer & Fuller Associated Architects*, 357 P.2d 611 (Ariz. 1960).

[FN31]. A.R.S. § 12-3014(A).

[FN32]. *Id.* § 12-3014(C).

[FN33]. *Id.* §§ 12-3015 and 12-3017.

[FN34]. *Id.* § 12-3015(A).

[FN35]. *Id.* § 12-3015(B).

[FN36]. *Id.* § 12-3017(C).

[FN37]. *Id.* § 12-3017(D).

[FN38]. *Id.* § 12-3017(E).

[FN39]. *Id.* § 12-3021.

[FN40]. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (In FAA case, arbitration panel permitted to award punitive damages to brokerage house customers, even though choice-of-law provision provided that contract was governed by New York law, which prohibited arbitrators from awarding punitive damages.)

[FN41]. A.R.S. § 12-3021(A).

[FN42]. *Id.* § 12-3021(E).

[FN43]. Generally, the "manifest disregard of the law" is a federal common law doctrine that only applies to the FAA. Arizona state courts have never adopted it in construing the UAA. Indeed, it is even questionable whether the federal "manifest disregard of the law" doctrine is itself alive after the U.S. Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). The Ninth Circuit thinks so, but other circuits disagree. *See* *Comedy Club, Inc. v. Improv West Associates*, 553 F.3d 1277 (9th Cir. 2009). Essentially, "Manifest disregard of the law" means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law. Rather, "[i]t must be clear from the record that the arbitrator recognized the applicable law and then ignored it." *Id.* at 1290.

[FN44]. A.R.S. § 12-3021(E).

[FN45]. *See, e.g.*, these Arizona state court cases wherein the parties' arbitrable claims would have permitted or allowed an award punitive damages: *Flower World of America, Inc. v. Wenzel*, 594 P.2d

1015 (Ariz. Ct. App. 1978) ("various deceptive practices" in violation of Arizona's Consumer Fraud Act); *Rocz v. Drexel Burnham Lambert, Inc.*, 743 P.2d 971 (Ariz. Ct. App. 1987) (investor's claim that trading by brokerage firm constituted device, scheme or artifice to defraud in violation of Securities Act of 1933); *Smith v. Logan*, 799 P.2d 1378 (Ariz. Ct. App. 1990) (fraudulent inducement claim); *Steer v. Eggleston*, 47 P.3d 1161 (Ariz. Ct. App. 2002) (arbitrator made award on claims for breach of fiduciary duty, diversion of partnership funds, accounting, and racketeering); *New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n*, 467 P.2d 88 (Ariz. Ct. App. 1970) (malicious filing of liens). Nothing in any of these cases suggests that the parties could not (or did not) seek punitive damages from the arbitrators.

[FN46]. *See, e.g.*, AAA Rule R-43, which provides: "Scope of Award, (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract."

[FN47]. A.R.S. §§ 12-3021(B) and (D).

[FN48]. 882 P.2d 1274 (Ariz. 1994).

[FN49]. A.R.S. § 12-3021(D).

Julie A. Wilson-McNemey, Appearances Can be Deceiving: Default Judgements by Motion or Hearing Under Rule 55(B) of the Arizona Rules of Civil Procedure 55 Arizona Law Review 235 (Spring, 2013)(abridged)[3]

Within the span of nine months, the Arizona Court of Appeals issued two directly conflicting rulings on the correct procedures required to obtain a default judgment under Rule 55(b) of the Arizona Rules of Civil Procedure. Although Rule 55(b) seems unambiguous on its face, the Arizona Court of Appeals arrived at two distinct interpretations regarding three key aspects of the rule--namely, what constitutes an appearance; when an appearance triggers the noticed hearing requirement; and when it is appropriate to grant a default judgment by motion or hearing. These competing interpretations hinge on how the policies behind the rule are balanced: Should Arizona favor conserving judicial resources or resolving cases on the merits? As it stands, Rule 55(b) most likely should be read to favor judicial economy given the history of amendments to the rule and a full reading of its plain language. If the Arizona Supreme Court ever takes up the issue, however, the Court ought to consider whether judicial economy should trump a defaulted defendant's interest in participating in a damages hearing when that defendant has shown an interest, albeit imperfect, in defending the claim.

Introduction

When a plaintiff seeks definite, clearly calculable damages from a defaulted defendant, should

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a court simply do the math and award the plaintiff damages? Or might a defaulted defendant's late appearance in the case entitle that defendant to a noticed hearing on damages before judgment? In 2012, Division One of the Arizona Court of Appeals provided two different answers to this question when it offered contradictory interpretations of the verb to appear and the notice requirement in Rule 55(b) of the Arizona Rules of Civil Procedure. Although Rule 55(b) seems unambiguous on its face, the court of appeals has arrived at distinct definitions of key language in the rule-- namely, what constitutes an appearance; when does an appearance trigger the noticed hearing requirement; and what is the dividing line between obtaining a default judgment by motion and by hearing. [FN1] These competing interpretations hinge on the appropriate policy behind the rule-- whether Arizona should favor conserving judicial resources or resolving cases on the merits.

Rule 55(b) establishes two different procedures a plaintiff can use to obtain a default judgment against a defaulted party: The plaintiff can request a default judgment by motion [FN2] or by hearing. [FN3] Default judgments by motion allow the court to dispose of cases quickly, whereas judgments by hearing require more judicial resources. A plaintiff may request a default judgment by motion when a defendant "has been defaulted for failure to appear" and the suit involves only liquidated damages. [FN4] "In all other cases," a plaintiff must apply to the court for a default judgment by hearing. [FN5] The defaulted defendant is then entitled to notice of the hearing if she has appeared in the action. [FN6]

In 2012, two cases before the Arizona Court of Appeals raised the question of whether a late appearance in an action by itself entitles a defaulted defendant to a noticed hearing on damages. In BYS Inc. v. Smoudi, the court found that if a defaulted defendant had appeared in the action, she must be given a noticed hearing on the issue of damages, regardless of the type of damages the plaintiff claimed. [FN7] Just nine months later, Searchtoppers.com, L.L.C. v. TrustCash LLC held that the type of damages the plaintiff claims, and not whether a defaulted party has appeared, determines when a hearing is required. [FN8] Under Searchtoppers, the plaintiff must provide the defaulted defendant with notice of a hearing only when damages are unliquidated and the defendant has appeared in the action. [FN9]

BYS and Searchtoppers have thrown the requirements for default judgments by motion and hearing into confusion. This drastic split in the court is highlighted by the fact that Judge Patricia Orozco wrote both the majority opinion in BYS and the dissent in Searchtoppers. [FN10] If the Arizona Supreme Court ever decides to take up this issue, the Court should examine the competing policy goals that underlie these two divergent interpretations to determine which interpretation of Rule 55(b) is correct. [FN11] Given the history of the rule [FN12] and a complete reading of its text, the underlying principle of Searchtoppers seems poised to win the day. That is, courts should read Rule 55(b) to favor judicial economy in all liquidated damages suits. However, before adopting this policy rationale, the Arizona Supreme Court ought to consider whether judicial economy should trump a defaulted defendant's interest in participating in a damages hearing when that defendant has shown an interest, albeit imperfect, in defending the claim.

I. Default Judgment Rules in Arizona

A. How to Obtain a Default Judgment in Arizona: The Text of Rule 55(b)

In Arizona, a defendant in a civil case has 20 days to file an answer after the service of a summons and complaint. [FN13] If a defendant fails to "plead or otherwise defend" within the 20-day window, the plaintiff may apply for an entry of default with the court clerk. [FN14] The plaintiff must serve the application for entry of default on the defendant, who then has ten days to "plead or otherwise defend." [FN15] If the defendant fails to respond within the ten-day grace period, the clerk will enter a default against the defendant. [FN16]

Once a default has been entered against a defendant, the plaintiff can seek a damages award through a default judgment under Rule 55(b). The plaintiff can obtain a default judgment from the court by motion or hearing. [FN17]

1. Rule 55(b)(1): Default Judgment by Motion

Under Rule 55(b)(1), a plaintiff may apply for a default judgment by motion "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, . . . if the defendant has been defaulted for failure to appear . . . ." [FN18] In other words, Rule 55(b)(1) contains two main requirements that must be met before a plaintiff can obtain a default judgment by a motion. [FN19] First, the plaintiff must claim liquidated, or clearly calculable, damages. [FN20] Second, the defendant must have been "defaulted for failure to appear." [FN21] The meaning of this second prong is the subject of the dispute between the Searchtoppers majority and Judge Orozco, the author of the dissenting opinion in Searchtoppers and the majority opinion in BYS. Both panels of the court of appeals reach different conclusions about the meaning of the verb to appear and when a noticed hearing is required. [FN22]

2. Rule 55(b)(2): Default Judgment by Hearing

"In all other cases"--that is, if the motion requirements mentioned above are not met?a party seeking a default judgment must ask for a hearing. [FN23] Despite the lack of clarity in the motion requirements in subsection (1), it is clear that once a hearing is warranted, a party seeking a default judgment must give notice under Rule 55(b)(2) if the defaulting party has appeared in the action. [FN24] A trial court may also hold a hearing and even a jury trial on damages where "it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter." [FN25]

3. The Interpretive Battleground: How Should Appearance Be Defined?

The confusion created by the recent Arizona Court of Appeals cases stems from the panels' differing interpretations of the following phrases: in all other cases in Rule 55(b)(2), has appeared in Rule 55(b)(2), and failure to appear in Rule 55(b)(1). The court of appeals has proposed two

different interpretations of the verb to appear. The first interpretation finds two definitions of the verb in both subsections of Rule 55(b): In subsection (1), the verb means that a defendant has been defaulted for a failure to plead or otherwise defend under Rule 55(a) of the Arizona Rules of Civil Procedure. [FN26] In subsection (2), the verb is more liberally defined as merely subjecting oneself to the jurisdiction of the court. [FN27] The second interpretation finds that the liberal definition of appearance in subsection (2) also applies to subsection (1). [FN28]

The court's divergent interpretations of the verb to appear affect how the rule operates in practice. The phrase in all other cases suggests that the two subsections are mutually exclusive. That is, if the requirements for a default judgment by motion are not met, then a judgment must be obtained by hearing. If the subsections are mutually exclusive, then only one test should apply to determine whether a plaintiff should seek a default judgment by motion or hearing. The question then is which definition of appearance should be incorporated into that test. If the word appearance has two definitions, a noticed hearing will be required whenever damages are unliquidated and the defendant has not "defaulted for failure to appear." [FN29] If a single definition of appearance is used, a noticed hearing will be required whenever the defendant has appeared in any form, even if late, and regardless of the type of damages plaintiff seeks. [FN30] Thus, the first interpretation draws the line between the motion and hearing procedures based on the type of damages the plaintiff seeks, whereas the second interpretation draws the line based on a defaulting party's appearance, or lack thereof.

B. Why Does Arizona Allow Default Judgments by Motion and Hearing?: The Policy Behind Rule 55(b)

These conflicting interpretations stem from two different views of the appropriate policy goals behind the rule. Rule 55(b) balances two competing policy concerns--judicial efficiency and resolving suits on their merits. Prior to 1975, Rule 55(b) contained a single procedure for obtaining a default judgment--by application to the court, which had discretion to conduct a hearing. [FN31] This version of the rule afforded a defaulted party who had appeared in an action a "reasonable opportunity to litigate his claim or defense on the merits." [FN32] In 1975, Arizona amended Rule 55(b) to create a bifurcated procedure for obtaining a default judgment. [FN33] Under the modern Rule 55(b), parties can seek a default judgment by a motion or a hearing. [FN34] By allowing a judge to enter a judgment on a motion in certain instances, this revision introduced a faster, more efficient way for parties to obtain a default judgment.

In effect, the Arizona Court of Appeals has found that the purpose of the modern version of Rule 55(b) is to conserve judicial resources by eliminating unnecessary hearings on damages. [FN35] Arizona treats an entry of default as an "admission of liability." [FN36] Therefore, upon the entry of default, the defaulted party can no longer litigate liability. [FN37] With the issue of liability resolved, a court only needs to determine damages. In liquidated damages cases, holding a full damages hearing would waste judicial resources. [FN38] Often a court can simply do the math for itself, or it can enforce a liquidated damages clause in a contract. [FN39] In such cases, the court does not need to hold a damages hearing because the court has no discretion in determining damages.

[FN40] Therefore, awarding a default judgment by motion is appropriate. [FN41] As the Arizona Court of Appeals has described, an entry of default in a liquidated damages case essentially constitutes an admission of both liability and the amount of damages owed. [FN42]

The second policy behind Rule 55(b) reflects a preference that most cases be decided on their merits. The rule protects this policy in three ways. First, the Arizona Court of Appeals has narrowly interpreted the definition of liquidated damages. Liquidated damages only include those claims that have "been fixed, settled, or agreed upon by the parties." [FN43] A plaintiff cannot transform an unliquidated damages claim into one for liquidated damages just by asking for a specific amount of money. [FN44] This narrow definition limits the scope of the motion procedure and prevents plaintiffs from turning every complaint into a claim for liquidated damages in order to quickly receive a judgment without dispute. [FN45]

Second, a hearing, notice, and even a jury trial may be required under Rule 55(b)(2) if the damages are uncertain. [FN46] When the trial court decides to hold a damages hearing, the defaulted party may fully participate in the hearing by contesting damages, cross-examining witnesses, and offering evidence that contradicts the plaintiff's claim. [FN47]

Finally, some cases suggest that if a defendant has ever submitted herself to the jurisdiction of the court, even if such an appearance has been late, the defendant should be invited to participate in a hearing to contest damages. [FN48] This liberal definition of appearance evinces the Arizona Supreme Court's reluctance to take away a defaulted defendant's ability to be heard on damages when a defaulted party has appeared after the entry of default. [FN49] By employing "an adversary system of justice," the court can ensure that damages will be decided justly on the merits. [FN50]

This second policy consideration, which expresses a preference that most cases be decided on their merits, could provide an answer to the ambiguous definition of appearance discussed above. To allow a defendant who has made a late appearance to participate in a damages hearing, Rule 55(b) must be interpreted to have a single, liberal definition of appearance. The next Part considers whether Rule 55(b) should be understood in terms of this policy goal.

II. Judicial Attempts to Define Appearance: BYS and Searchtoppers

Within the span of nine months, Division One of the Arizona Court of Appeals issued two rulings, on similar sets of facts, that came to contrary conclusions regarding the following question: Is a defaulted defendant entitled to a noticed hearing on the issue of damages if she subsequently appears in a case after a default has been entered? Under BYS, a defaulted defendant receives a noticed hearing whenever she has appeared in the action. [FN51] Under Searchtoppers, a defaulted defendant does not receive a noticed hearing when the plaintiff claims liquidated damages, even when the defendant has appeared. [FN52] The two interpretations favor either resolving cases on their merits or promoting judicial efficiency, respectively.

A. A Single Definition of Appearance: BYS Inc. v. Smoudi and Judge Orozco's Dissent in

BYS involved a liquidated damages claim, a defaulted defendant who appeared late in the action, and a default judgment by motion. [FN53] BYS sued the Smoudis for breach of contract on a lease agreement for failure to pay rent and maintenance charges. [FN54] The Smoudis failed to file an answer in the case, and BYS filed an application for entry of default. [FN55] Nearly a month later, the defendants filed a request for a time extension and paid the answer fee. [FN56] BYS responded to the Smoudis' request, but later filed a motion for default judgment, which the court granted. [FN57] The Smoudis filed a motion to set aside the judgment, arguing that they had appeared in the action through their request for a time extension and were therefore entitled to notice and a hearing per Rule 55(b)(2). [FN58] The Arizona Court of Appeals agreed and voided the default judgment. [FN59]

The BYS court interpreted Rule 55(b) as containing a single definition of appearance. In an opinion that relied on case law decided under the pre-amendment version of Rule 55(b), [FN60] the BYS court defined appearance as "any action taken by the defendant in which he recognizes that the case is in court and submits himself to the court's jurisdiction." [FN61] Under this interpretation, a plaintiff may seek a judgment by motion if two conditions are met: (1) The plaintiff has claimed liquidated damages, and (2) the defendant has never appeared in the action. [FN62] A default for "failing to plead or otherwise defend as set forth in Rule 55(a)" does not prevent a party from appearing in the case to contest damages. [FN63] On the contrary, a hearing is required "when a party has: (1) appeared, regardless of whether the damages are liquidated or unliquidated; and (2) when a party has not appeared, and the damages are unliquidated." [FN64] A plaintiff must give a defaulted defendant notice of the upcoming damages hearing when the defaulted defendant has appeared in the action. [FN65]

This interpretation has significant real-world effects on the way Rule 55(b) functions. For example, picture a defendant in a liquidated damages case who has been defaulted for failing to plead or otherwise defend under Rule 55(a). This defendant did not file a timely answer; however, she did file a late answer after the entry of default but before the default judgment. Because the defaulted defendant has submitted herself to the jurisdiction of the court and has shown an interest in defending the suit, the plaintiff must now seek a default judgment by hearing. The plaintiff must also provide the defaulted defendant with notice three days prior to the hearing. Although this might not be the most efficient outcome, this interpretation of the rule ensures an adversarial hearing where damages will most certainly be decided on the merits.

This is not to say that the BYS interpretation always has inefficient results. Imagine a defaulted defendant in a liquidated damages case who has never appeared in the action. She does not file a timely answer, and she never contacts the court or submits herself to its jurisdiction. In this fact pattern, the plaintiff must obtain a default judgment by motion. Therefore, while this interpretation of Rule 55(b) generally favors deciding cases on the merits and not by the application of procedural rules, it does not always do so at the expense of efficiency.

Nor is the BYS interpretation of the word appearance in Rule 55(b) novel. The federal courts, under their nearly identical default judgment rule, [FN66] have also interpreted appearance broadly. [FN67] Federal Rule 55(b)(1) allows a federal clerk to enter a default judgment only if a party has "never appeared in the action." [FN68] A single appearance, even if late, triggers "the special notice and judicial review protections provided in [[Federal Rule 55(b)(2)]." [FN69] This notice requirement "protect[s] those parties who, although delaying in a formal sense by failing to file pleadings within the twenty day period, have otherwise indicated to the moving party a clear purpose to defend the suit." [FN70] Federal Rule 55(b) tempers judicial efficiency goals with the concern that defaulted defendants receive procedural protections when they have appeared.

Arizona strives to achieve a uniform interpretation between its rules of civil procedure and the federal rules. [FN71] The federal rule, however, differs from Arizona's rule in an important way. Federal Rule 55(b) establishes two procedures for awarding a default judgment--entry by the clerk or entry by the court. [FN72] Arizona, on the other hand, has adopted a different bifurcated procedure that allows default judgments to be awarded by motion or hearing. [FN73] This semantic difference, however, has not stopped Arizona courts from trying to harmonize the two rules.

Arizona courts certainly attempted to harmonize the two rules prior to the 1975 amendment of Arizona Rule 55(b), [FN74] and the Arizona Supreme Court has extended this interpretive approach to the modern version of the rule. [FN75] In Tarr v. Superior Court, the Court held that the filing of a late answer after an entry of default but before an application for default judgment has been made can constitute an appearance that triggers the notice and hearing requirements of Rule 55(b)(2). [FN76] A default under Rule 55(a) does not prevent the defaulted party from "appearing in the action." [FN77] The Court went on to state that Arizona follows the "majority rule" regarding appearances and then defined the term in a familiar manner: "[A]n appearance can be any action by which a party comes into court and submits himself to its jurisdiction." [FN78] This suggests that the Arizona Supreme Court may have intended to continue interpreting the modern version of Arizona Rule 55(b) to be consistent with the federal rule's liberal appearance standard. BYS continued to harmonize the Arizona rule with the federal rule by relying on Tarr's liberal definition of appearance. [FN79]

The BYS perspective seems plausible even under statutory interpretation rules. It ensures a single, coherent definition of appearance throughout the rule by adopting Tarr's liberal appearance standard in both subsections. This unified reading accords with Arizona's preference for avoiding interpretations that render statutory language contradictory. [FN80] This approach ensures consistency in language and confirms a unitary policy goal for Rule 55(b)--to protect trials on the merits.

The BYS court's interpretation of Rule 55(b) favors a trial on the merits in most instances by adopting a procedure which ensures that defaulted defendants who have appeared in the action will always be entitled to a noticed hearing on damages. In adopting a liberal definition of appearance, BYS attempted to harmonize the Arizona rule with the federal rule and to follow the Arizona Supreme Court's decision in Tarr to continue this approach, even after the 1975 amendment to the

rule. This interpretation should be afforded a certain amount of weight because it attempts to comply with Arizona Supreme Court precedent on the issue.

B. Appearance Two Ways: Searchtoppers.com, L.L.C. v. TrustCash, LLC

In a case with similar facts, the Searchtoppers court disagreed with the BYS court's statutory interpretation and ruled that even if a defendant files a late answer after the entry of default, that defendant is not entitled to a noticed hearing if damages are liquidated. [FN81] Searchtoppers.com, L.L.C. ("Searchtoppers"), filed suit against TrustCash, LLC ("TrustCash"), alleging breach of contract for failure to pay a monthly fee. [FN82] Like the Smoudis, TrustCash failed to file an answer within the statutorily required 20 days after service of the complaint. [FN83] So, Searchtoppers filed an application for default, which became effective ten days later. [FN84] Six days after the default had been entered, TrustCash filed an answer and a notice of appearance. [FN85] Searchtoppers then filed a motion for default judgment without a hearing, arguing that damages were liquidated and that the case fell under Rule 55(b)(1). [FN86] On appeal, TrustCash argued that it was entitled to a hearing on the issue of damages because its late answer constituted an appearance that triggered Rule 55(b)(2)'s noticed hearing requirement. [FN87] The court of appeals disagreed and found that a default judgment by motion was appropriate. [FN88]

The Searchtoppers court interpreted Rule 55(b) as containing two distinct definitions of appearance. Unlike the BYS interpretation, the Searchtoppers court read "defaulted for failure to appear" as synonymous with Rule 55(a)'s requirement that a default be entered when a defendant has failed "to plead or otherwise defend." [FN89] According to Searchtoppers, a default judgment by motion is appropriate if two requirements are met: (1) The plaintiff has claimed liquidated damages, and (2) the defendant has been defaulted for failure to appear pursuant to Rule 55(a). [FN90] Under this interpretation then, the phrase in all other cases means all cases in which the plaintiff claims unliquidated damages or where a default has been entered on grounds other than Rule 55(a). [FN91] In other words, defaulted defendants in liquidated damages cases are not entitled to a noticed hearing; whereas, defaulted defendants in unliquidated damages cases are entitled to a noticed hearing if they have made a late appearance. [FN92]

The real-world effects of the Searchtoppers court's interpretation of Rule 55(b) differ wildly from the way the rule would operate under the BYS interpretation. Consider the hypothetical defendants discussed above. In this hypothetical liquidated damages case, the defendant has been defaulted for failing to plead or otherwise defend under Rule 55(a). She also filed a late answer after the entry of default but before the default judgment. Under Searchtoppers, because the plaintiff seeks liquidated damages and the defendant has been defaulted under Rule 55(a), the plaintiff must seek a default judgment by motion. The defaulted defendant is not entitled to a hearing on damages. Nor is the defaulted defendant entitled to notice, because Rule 55(b)(1) does not contain a notice requirement. The type of damages the plaintiff seeks determines which procedure applies. Therefore, the result will be the same regardless of whether a defaulted defendant has appeared in the action.

Now take a defaulted defendant in an unliquidated damages case who has never appeared. This

defendant is entitled to a hearing on damages. However, the notice requirement in Rule 55(b)(2) is only triggered if the defaulted defendant has appeared in the action by submitting herself to the jurisdiction of the court. This defaulted defendant, who has never appeared, does not receive notice of the impending default judgment hearing.

Under these hypotheticals, the Searchtoppers interpretation of Rule 55(b) favors judicial efficiency based on the proposition that a hearing is always unnecessary if the court has no discretion in calculating liquidated damages. In effect, this approach places judicial efficiency above procedures that favor deciding cases on the merits.

Indeed, Searchtoppers viewed the addition of the motion procedure in 1975 as effecting a fundamental change in the way the rule operates. [FN93] Therefore, the Searchtoppers court rejected Judge Orozco's interpretation of the modern Rule 55(b) because her argument relied on inapposite case law that interpreted the pre-1975 version of the rule. [FN94] Judge Orozco centered her majority opinion in BYS on Rogers v. Tapo, which interpreted the interplay between the notice and hearing requirements in the old rule. [FN95] The BYS decision cited Rogers for the proposition that "[o]nce a defendant has appeared, a default judgment can be obtained only after a hearing by the court upon three days' written notice." [FN96] The Searchtoppers court found that the 1975 amendment to Rule 55(b) entitles a party seeking liquidated damages to apply for a default judgment by motion without needing to provide "any additional notice to the defaulted party," full stop. [FN97] The centerpiece of the BYS opinion, then, appears to be outdated, as is all other case law that interprets the old rule.

Searchtoppers raises the question of whether harmonizing the Arizona rule with federal policy goals is still appropriate. Most pre-1975 case law attempts to harmonize the definition of appearance in Arizona Rule 55(b) with the federal courts' liberal interpretation of the term in the federal rule. [FN98] In attempting to create such harmony, Arizona courts also imported the federal rule's policy goal of favoring decisions on the merits into Arizona case law regarding Rule 55(b). [FN99] However, because pre-1975 Arizona case law on Rule 55(b) is now inapposite in interpreting the modern rule, it may no longer be appropriate to look to federal policy goals to ascertain the meaning of modern Arizona rule.

With its narrow reading of the Arizona Supreme Court's holding in Tarr, Searchtoppers continues to question whether harmonizing the Arizona with federal policy goals is still appropriate. BYS viewed Tarr as a modern attempt to adopt the broad federal interpretation of appearance; however, Searchtoppers rejected this approach in favor of a narrow reading of the word. [FN100] Under the Searchtoppers view, Tarr's definition of appearance applies solely to the notice requirement under Rule 55(b)(2), which is only considered after the need for a hearing has already been established. [FN101] Although the Supreme Court's broad interpretation of appearance certainly must be respected, the Searchtoppers decision reasoned that Tarr's definition of appearance in subsection (2) has no bearing on the meaning of the word in subsection (1). [FN102] Furthermore, under the Searchtoppers view of Rule 55(b), subsection (1) does not even contain a notice requirement. [FN103] Therefore, Tarr could not have "implicitly engraft[ed] the notice provision of

Rule 55(b)(2)" and its attendant definition of appearance into Rule 55(b)(1). [FN104]

The rule's own policy goals may also warrant this narrow interpretation. The Arizona Court of Appeals believes that the 1975 amendment to Rule 55(b) fundamentally changed the policy behind the rule. With the addition of the motion procedure, however, efficiency becomes a concern in the statutory analysis. The Searchtoppers court read the modern version of the rule as eliminating any hearings for defaulted defendants in liquidated damages cases. [FN105] Therefore, if Arizona adopts the BYS interpretation of the rule, it would give more noticed hearings to defaulted defendants than the amendment intended.

Furthermore, most Arizona Court of Appeals cases after 1975 point toward the interpretation in Searchtoppers. As early as 1978, the court of appeals turned away from appearance as the dividing line between the subsections of the rule and focused instead on liquidated damages to ensure that the rule promotes efficiency. [FN106] Now, a trial court only needs to hold a default judgment hearing when the plaintiff seeks unliquidated damages. [FN107] The court of appeals has also found that the 1975 revision of Rule 55(b) changed what a defaulted party admits to by defaulting. A default now constitutes an admission as to the amount of damages owed, in addition to an admission of liability. [FN108]

The Searchtoppers interpretation is also plausible under statutory interpretation rules. Although the Searchtoppers court arrived at two separate definitions of appearance, this does not lead to contradictory interpretations of the same term, as Judge Orozco worries. [FN109] By tying the definition of failure to appear to Rule 55(a), the Searchtoppers court actually read the full phrase together, which states that a defendant must be "defaulted for failure to appear." The BYS court's use of a singular definition of appearance between the two subsections actually reads the word defaulted out of subsection (1), thereby rendering the word superfluous. Searchtoppers avoids such a result by treating the phrase defaulted for failure to appear as a default under Rule 55(a) and by reading the verb appeared in subsection (2) separately under Tarr's more liberal definition of appearance. Therefore, Searchtoppers follows Arizona's preference against rendering language in a statute superfluous. [FN110]

Moreover, the Searchtoppers interpretation of Rule 55(b) balances the competing policy goals behind the rule by adopting a procedure that conserves judicial resources whenever a plaintiff claims liquidated damages. By making damages the distinguishing characteristic between the two subsections, Searchtoppers also adheres to the court of appeals' past understanding of the 1975 amendment--that the new Rule 55(b) reduces the process available to defaulted defendants in liquidated damages cases. Such an interpretation should be afforded significant weight. After all, if the rule intends to maintain a high level of due process protection for all defaulted defendants, as the BYS court argues, why was the rule amended to reduce the process available?

[FN2]. Ariz. R. Civ. P. 55(b)(1).

[FN3]. Ariz. R. Civ. P. 55(b)(2).

[FN4]. Ariz. R. Civ. P. 55(b)(1). A plaintiff may only obtain a default judgment by motion following Rule 55(b)(1) if the defendant "is not an infant or incompetent person." Id. Rule 55(b)(1) uses the term sum certain damages. Id. For ease of use, I follow Searchtoppers in using the term liquidated damages to cover sum certain, easily calculable, and liquidated damages. See 293 P.3d at 515 n.5.

[FN5]. Ariz. R. Civ. P. 55(b)(2).

[FN6]. Id. ("If the party against whom judgment by default is sought has appeared in the action, that party...shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.").

[FN7]. 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

[FN8]. 293 P.3d at 515, 517.

[FN9]. Id. at 515.

[FN10]. Id. at 518-20 (Orozco, J., dissenting); BYS Inc., 269 P.3d at 1198-1203.

[FN11]. Neither TrustCash nor BYS appealed their cases to the Arizona Supreme Court. See Westlaw search of case history for BYS Inc., 269 P.3d 1197; Court of Appeals Division One, Civil Appeal, Docket No. 1 CA-CV 11-0171, Searchtoppers.com v. Trustcash (2013), available at http://apps.supremecourt.az.gov/aacc/1ca/1cacase.htm (follow "Active Civil Cases" hyperlink; then follow "1 CA-CV 11-0171" hyperlink) (last visited Mar. 4, 2013) (on file with Author); Ariz. R. Civ. App. P. 23(a) (stating parties may file a petition of review with the Arizona Supreme Court "within 30 days after the Arizona Court of Appeals issues its decision").

[FN12]. See generally infra notes 31-42 and accompanying text.

[FN13]. Ariz. R. Civ. P. 12(a)(1)(A).

[FN14]. Ariz. R. Civ. P. 55(a).

[FN15]. Id.

[FN16]. Id.

[FN17]. Ariz. R. Civ. P. 55(b).

[FN18]. Ariz. R. Civ. P. 55(b)(1) (emphasis added).

[FN19]. Rule 55(b)(1) also contains a third requirement--that the defaulted defendant not be an "an

infant or incompetent person." Id. This provision of Rule 55(b)(1) is not addressed in BYS or Searchtoppers. See Searchtoppers.com, L.L.C. v. TrustCash LLC, 293 P.3d 512, 513-18 (Ariz. Ct. App. 2012); BYS Inc. v. Smoudi, 269 P.3d 1197, 1198-1202 (Ariz. Ct. App. 2012).

[FN20]. Ariz. R. Civ. P. 55(b)(1).

[FN21]. Id.

[FN22]. See infra Parts I.A.3, II.

[FN23]. Ariz. R. Civ. P. 55(b)(2).

[FN24]. Id. ("If the party against whom judgment by default is sought has appeared in the action, that party...shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.").

[FN25]. Id. The full text of Rule 55(b)(2) reads as follows:

> By hearing. In all other cases the party entitled to a judgment shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, that party or, if appearing by representative, that party's representative, shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when required by law.
>
> Id. (emphasis added).

[FN26]. Searchtoppers.com, L.L.C. v. TrustCash LLC, 293 P.3d 512, 515 (Ariz. Ct. App. 2012) (defining the phrase "has been defaulted for failure to appear," as equivalent to the definition "provided in Rule 55(a)[:] the defendant has been defaulted for failing to plead or otherwise defend before the entry of default became effective").

[FN27]. Id. at 515 n.7, 516 (defining appearance in subsection (2) as when defendants "submit[] themselves to the jurisdiction of the court" (quoting Tarr v. Superior Court, 690 P.2d 68, 71 (Ariz. 1984))).

[FN28]. BYS Inc. v. Smoudi, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012) ("'Appearance' is construed liberally and generally applies to any action taken by the defendant in which he recognizes that the case is in court and submits himself to the court's jurisdiction." (citing Tarr, 690 P.2d at 70)).

[FN29]. Searchtoppers.com, L.L.C., 293 P.3d at 515 (emphasis added).

[FN30]. See BYS Inc., 269 P.3d at 1202.

[FN31]. Ariz. R. Civ. P. 55(b) (1956); see also Searchtoppers.com, L.L.C., 293 P.3d at 515 n.8; Rogers v. Tapo, 230 P.2d 522, 525 (Ariz. 1951). Under the old Rule 55(b), the party seeking the judgment was required to serve notice of the application for default judgment on a defaulted defendant if the defaulted party had appeared in the action. Ariz. R. Civ. P. 55(b) (1956). The court could hold a hearing before granting a default judgment if it needed more information to determine the amount of damages to award. Id.

The relevant text of Rule 55(b) prior to the 1975 amendment reads:

Rule 55(b) Judgment by default. Judgment by default may be entered as follows:

1. In all cases the party entitled to judgment by default shall apply to the court therefor....If the party against whom judgment by default is sought has appeared in the action, he...shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.

2. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages..., the court may conduct such hearings...as it deems necessary and proper[.]

Searchtoppers.com, L.L.C., 293 P.3d at 515 n.8 (quoting Ariz. R. Civ. P. 55(b) (1956)).

[FN32]. Rogers, 230 P.2d at 525.

[FN33]. Searchtoppers.com, L.L.C., 293 P.3d at 515-16. The 1975 amendment changed the language of Rule 55(b)(1) to establish a procedure for obtaining a default judgment by motion. See Ariz. R. Civ. P. 55(b)(2). The text of the old Rule 55(b) was combined and moved into what is now Rule 55(b)(2). Compare Ariz. R. Civ. P. 55(b) (1956), with Ariz. R. Civ. P. 55(b)(2).

[FN34]. Ariz. R. Civ. P. 55(b).

[FN35]. See Searchtoppers.com, L.L.C., 293 P.3d at 515-16; see also Monte Produce, Inc. v. Delgado, 614 P.2d 862, 863-64 (Ariz. Ct. App. 1980).

[FN36]. Dungan v. Superior Court, 512 P.2d 52, 53 (Ariz. Ct. App. 1973).

[FN37]. Tarr v. Superior Court, 690 P.2d 68, 70 (Ariz. 1984).

[FN38]. See Searchtoppers.com, L.L.C., 293 P.3d at 517 (finding that a hearing is unnecessary when damages are certain because the court lacks discretion to calculate the monetary amount).

[FN39]. See Monte Produce, Inc., 614 P.2d at 863-64.

[FN40]. Searchtoppers.com, L.L.C., 293 P.3d at 517.

[FN41]. Id.

[FN42]. Monte Produce, Inc., 614 P.2d at 864.

[FN43]. Beyerle Sand & Gravel, Inc. v. Martinez, 574 P.2d 853, 856 (Ariz. Ct. App. 1977).

[FN44]. Id. To have a rule to the contrary would mean that "almost any unliquidated claim [could] be transformed into a claim for a sum certain merely by placing a monetary amount on the item of claimed damage even though such amount has not been fixed, settled, or agreed upon by the parties and regardless of the nature of the claim." Id.

[FN45]. See id.

[FN46]. Ariz. R. Civ. P. 55(b)(2); see Mayhew v. McDougall, 491 P.2d 848, 853 (Ariz. Ct. App. 1971); see also Dungan v. Superior Court of Pinal County, 512 P.2d 52, 53-54 (Ariz. Ct. App. 1973). It should be noted that these cases interpret the old version of Rule 55(b).

[FN47]. See Hilgeman v. Am. Mortg. Sec., Inc., 994 P.2d 1030, 1039 (Ariz. Ct. App. 2000) ("contested evidentiary hearing, on the record"); Tarr v. Superior Court, 690 P.2d 68, 70 (Ariz. 1984) (full participation in hearing); Monte Produce, Inc., 614 P.2d at 864 (ability to contest damages); Dungan, 512 P.2d at 54 (ability to cross-examine witnesses and offer contradictory evidence).

[FN48]. Tarr, 690 P.2d at 70; BYS Inc. v. Smoudi, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

[FN49]. Tarr, 690 P.2d at 70.

[FN50]. Neis v. Heinsohn/Phoenix, Inc., 628 P.2d 979, 984 (Ariz. Ct. App. 1981) (quoting Dungan, 512 P.2d at 54).

[FN51]. 269 P.3d at 1202.

[FN52]. Searchtoppers.com, L.L.C. v. TrustCash LLC, 293 P.3d 512, 515 (Ariz. Ct. App. 2012).

[FN53]. BYS Inc., 269 P.3d at 1198-99, 1202.

[FN54]. Id. at 1198.

[FN55]. Id. at 1198-1200.

[FN56]. Id. at 1199.

[FN57]. Id.

[FN58]. Id.

[FN59]. Id. at 1202.

[FN60]. Id.

[FN61]. Id. (citing Tarr v. Superior Court, 690 P.2d 68, 70 (Ariz. 1984)).

[FN62]. See id.; see also Searchtoppers.com, L.L.C. v. TrustCash LLC, 293 P.3d 512, 518-19 (Ariz. Ct. App. 2012) (Orozco, J., dissenting).

[FN63]. Searchtoppers.com, L.L.C., 293 P.3d at 519 (Orozco, J., dissenting) (emphasis omitted); see also BYS Inc., 269 P.3d at 1202 (Ariz. Ct. App. 2012) (citing Tarr, 690 P.2d at 70).

[FN64]. BYS Inc., 269 P.3d at 1202.

[FN65]. Id.

[FN66]. Fed. R. Civ. P. 55(b)(1)-(2). The full text of Federal Rule 55(b) reads as follows:

> (b) Entering a Default Judgment.
>
> (1) By the Clerk. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.
>
> (2) By the Court. In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to:
>
> (A) conduct an accounting;
>
> (B) determine the amount of damages;
>
> (C) establish the truth of any allegation by evidence; or
>
> (D) investigate any other matter.
>
> Fed. R. Civ. P. 55(b).

[FN67]. Federal courts have defined an appearance under Federal Rule 55(b), as "involv[ing] some presentation or submission to the court." Charles Alan Wright et al., Federal Practice and Procedure §2686 (3d ed. 2012) (citations omitted) (internal quotation marks omitted).

[FN68]. Id. §2683.

[FN69]. Id. §2686.

[FN70]. Id. §2687.

[FN71]. Orme Sch. v. Reeves, 802 P.2d 1000, 1003 (Ariz. 1990) ("[Arizona] subscribe[s] to the principle that uniformity in interpretation of our rules and the federal rules is highly desirable.").

[FN72]. Fed. R. Civ. P. 55(b).

[FN73]. Ariz. R. Civ. P. 55(b)(2).

[FN74]. See Rogers v. Tapo, 230 P.2d 522, 525 (Ariz. 1951) ("An appearance does not prevent a party from being in default for failure to plead or otherwise defend, but in order for a plaintiff to secure a default judgment against a defendant it is incumbent upon plaintiff to give the three day written notice of application for judgment required under...Rule 55(b)." (citation omitted)); Austin v. State ex rel. Herman, 459 P.2d 753, 756 (Ariz. Ct. App. 1969) ("[A]ny action on the part of defendant, except to object to the jurisdiction over his person[,] which recognizes the case as in court, will constitute a general appearance." (citations omitted)).

[FN75]. Tarr v. Superior Court, 690 P.2d 68, 70-71 (Ariz. 1984) (citing Annotation, What Amounts to an "Appearance" Under Rule 55(b)(2) of the Federal Rules of Civil Procedure, Providing That If the Party Against Whom a Judgment by Default Is Sought Has "Appeared" in the Action, He Shall Be Served with Written Notice of the Application for Judgment, 27 A.L.R. Fed. 620 (1976)) (referring to Arizona case law that interprets the notice requirement of the rule's pre-1975 version).

[FN76]. Id. at 69-71.

[FN77]. Id. at 70.

[FN78]. Id.

[FN79]. See BYS Inc. v. Smoudi, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

[FN80]. Searchtoppers.com, L.L.C. v. TrustCash LLC, 293 P.3d 512, 519 (Ariz. Ct. App. 2012) (Orozco, J., dissenting) (citing In re Moises L., 18 P.3d 1231, 1233 (Ariz. Ct. App. 2000) ("[W]e undertake to avoid rendering statutory language superfluous, void, contradictory, or insignificant." (internal quotation marks omitted))).

[FN81]. Id. at 516-17 (majority opinion).

[FN82]. Id. at 513.

[FN83]. Id.

[FN84]. Id.

[FN85]. Id.

[FN86]. Id at 514.

[FN87]. Id.

[FN88]. Id. at 513.

[FN89]. Id. at 515.

[FN90]. Id.

[FN91]. Id. Searchtoppers found that when a default has been entered as a sanction pursuant to Rule 37, the defaulted party is entitled to notice and a hearing under Rule 55(b)(2). Id. at 515 n.6 (citing Poleo v. Grandview Equities, Ltd., 692 P.2d 309, 313 (Ariz. Ct. App. 1984) ("We hold that the party whose pleadings have been stricken as a sanction under Rule 37 must be given notice of the application for judgment as required by Rule 55(b)(2) because that party has 'appeared' in the action.")).

[FN92]. Id. at 517 ("The nature of the claim is what distinguishes Rule 55(b)(1) (which does not require notice) from Rule 55(b)(2) (which does require notice).").

[FN93]. See Searchtoppers.com, L.L.C., 293 P.3d at 515-16; see also supra note 31; see generally supra Part I.B.

[FN94]. Searchtoppers.com, L.L.C., 293 P.3d at 516.

[FN95]. BYS Inc. v. Smoudi, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

[FN96]. Id. (citing Rogers v. Tapo, 230 P.2d 522, 525 (Ariz. 1951)).

[FN97]. 293 P.3d at 516.

[FN98]. See Rogers, 230 P.2d at 524-25; Austin v. State ex rel. Herman, 459 P.2d 753, 756 (Ariz. Ct. App. 1969).

[FN99]. See supra Part II.A.

[FN100]. Searchtoppers.com, L.L.C., 293 P.3d at 516-17.

[FN101]. Id. The Searchtoppers court rejected the BYS court's interpretation of Tarr in part because the Arizona Supreme Court failed to mention both Rule 55(b)(1) and whether the plaintiff in that case sought liquidated damages. Id. at 516.

[FN102]. Id. at 516-17.

[FN103]. Id. at 517.

[FN104]. Id.

[FN105]. See id. at 517.

[FN106]. See S. Ariz. Sch. for Boys, Inc. v. Chery, 580 P.2d 738, 743 (Ariz. Ct. App. 1978).

[FN107]. See Monte Produce, Inc. v. Delgado, 614 P.2d 862, 863-64 (Ariz. Ct. App. 1980) ("It is only when unliquidated damages are sought that the trial court must conduct a hearing to determine the amount of damages." (citing Rule 55(b)(2))); see also S. Ariz. Sch. for Boys, Inc., 580 P.2d at 743.

[FN108]. Monte Produce, Inc., 614 P.2d at 864.

[FN109]. See Searchtoppers.com, L.L.C., 293 P.3d at 519 (Orozco, J., dissenting) ("If we were to interpret Rule 55(b)1 [sic] as the majority suggests, we would be holding that 'appearance' and 'plead and otherwise defend' have the same meaning. I reject such an interpretation." (citing In re Moises L., 18 P.3d 1231, 1233 (Ariz. Ct. App. 2000) ("[W]e undertake to avoid rendering statutory language superfluous, void, contradictory, or insignificant." (internal quotation marks omitted)))).

[FN110]. See In re Moises L., 18 P.3d at 1233 (quoting State v. Tarango, 914 P.2d 1300, 1304 (Ariz. 1996)).

Bruce E. Meyerson, Arizona Adopts the Revised Uniform Arizona Act, Arizona State Law Journal 481 (Summer, 2011)[4]

After seven years of consideration, [FN1] the Arizona Legislature in 2010 adopted the revised version of the Uniform Arbitration Act promulgated in 2000 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), commonly known as the Revised Uniform Arbitration Act (RUAA). [FN2] As of this writing, fourteen other states, including the District of Columbia, have adopted the RUAA or substantial versions of it. [FN3]

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The original Uniform Arbitration Act (UAA) was promulgated by NCCUSL in 1955 and adopted by the Arizona Legislature in 1962 (AZ-UAA). [FN4] NCCUSL appointed a Study Committee in 1994 to determine whether the UAA should be revised. By 1996 the Study Committee concluded that changes were needed and a Drafting Committee was appointed that year, holding its first meeting in May 1997. [FN5] The decision to revise the UAA was based on "the increasing use of arbitration, the greater complexity of many disputes resolved by arbitration, and the developments" in arbitration law. [FN6]

The purpose of this article is to review the newly-adopted legislation and draw upon prior Arizona appellate decisions, as well as decisions in other states which have adopted the RUAA, to assist in understanding its provisions. Decisions from other jurisdictions and the Comments to each section of the RUAA by the Drafting Committee are important because the AZ-RUAA provides that in "applying and construing" the law, "consideration must be given to the need to promote uniformity of the law with respect to its subject matter among [the] states that enact it." [FN7] Rather than replace the state's existing arbitration statute, the legislature adopted AZ-RUAA but excluded certain categories of disputes from the AZ-RUAA, making those disputes subject to the AZ-UAA. These exceptions will be explained more fully later.

Relationship of State Arbitration Laws to the Federal Arbitration Act

Before describing the changes to Arizona's arbitration law made by the AZ-RUAA, it is important to understand the relationship between state arbitration laws such as the AZ-RUAA, and the Federal Arbitration Act (FAA). In enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration." [FN8] According to the Supreme Court, there are only two limitations on the enforceability of arbitration provisions governed by the FAA: "they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'" [FN9]

The Supreme Court has interpreted the term "involving commerce" in the FAA as indicating the broadest permissible exercise of Congress's Commerce Clause power. [FN10] The Supreme Court also has clarified that Congress's Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice subject to federal control. [FN11] Thus, the FAA's reach is quite broad.

Where an agreement falls within the coverage of the FAA, there is a strong presumption that the FAA, not state law, provides the rules for the arbitration. [FN12] Importantly, however, even if an arbitration agreement falls under the FAA, parties are free to conduct their arbitration under state arbitration laws such as the AZ-RUAA [FN13] so long as they manifest a "clear intent" to do so. [FN14] A general choice of law provision in a contract is not sufficient to remove a case from the

FAA's default provisions. [FN15] However, where parties agree to conduct their arbitration according to the arbitration law of a particular state, this constitutes sufficient manifestation of their intent so that the arbitration laws of that state will apply to their arbitration. [FN16]

By incorporating state arbitration laws, such as the AZ-RUAA, into an arbitration agreement, parties can utilize a complete set of procedural rules missing from the FAA, adopted almost ninety years ago. The AZ-RUAA provides a comprehensive set of procedural rules that answer many questions left open by the FAA. Thus, the RUAA "provides state legislatures with a more up-to-date statute to resolve disputes through arbitration." [FN17]

Key Definitions

The AZ-RUAA contains a number of definitions that make significant changes in arbitration practice. [FN18] First, an arbitration agreement must be contained in a "record" which is defined as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium . . . that is retrievable in perceivable form." [FN19] Unlike the AZ-UAA which requires an arbitration agreement to be in writing, [FN20] the AZ-RUAA defines record not only to mean a written document but also an electronic document. [FN21] Similarly, the arbitration award, which must be in a record, may also be in electronic format, although a "copy" of the award must be provided to each party to the arbitration proceeding. [FN22] The definition of record should be read in conjunction with a later provision of the AZ-RUAA which provides that the law is intended to conform to the Electronic Signatures in Global and National Commerce Act (Electronic Signatures Act). [FN23]

The definition of "knowledge" [FN24]--actual knowledge--should be read together with the meaning of "notice." [FN25] The concept of notice applies throughout the AZ-RUAA. For example, an arbitration is initiated by giving "notice in a record" to the other parties to the arbitration agreement. [FN26] Upon making an award, an arbitrator must give notice of the award to each party. [FN27]

Except where otherwise specified in the AZ-RUAA, [FN28] notice is given to another "by taking action that is reasonably necessary to inform the other person in ordinary course, whether or not the other person acquires knowledge of the notice." [FN29] For example, mailing notice to the last known address of a party has been held to be sufficient notice by an arbitrator of the date and time of a hearing. [FN30] A person is considered to have notice if the person has actual knowledge of the notice, [FN31] or if the person has received notice. [FN32] A person is considered to receive notice when it "comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of such communications." [FN33]

Applicability of the AZ-RUAA and Exclusions

The AZ-RUAA is applicable to any agreement to arbitrate made after January 1, 2011, or before,

if all parties agree. [FN34] On or after January 1, 2011, the AZ-RUAA "governs an agreement to arbitrate whenever made." [FN35] If an arbitration agreement is made before January 1, 2011, however, the AZ-UAA will apply if "an action or proceeding is commenced" before January 1, 2011; the AZ-RUAA will apply if the arbitration or proceeding is commenced after January 1, 2011. [FN36]

The AZ-RUAA does not entirely replace Arizona's existing arbitration law--the AZ-UAA. Four categories of disputes are excluded from the AZ-RUAA, three of which remain included within the AZ-UAA. In other words, Arizona now has two arbitration statutes. Like the AZ-UAA, disputes between an employer and employee or their respective representatives, are excluded from the AZ-RUAA. [FN37] Three categories of disputes remain subject to arbitration under the AZ-UAA: disputes arising from a contract of insurance, disputes between a national banking association or federal savings association (or its affiliate, subsidiary or holding company) and a customer, and disputes involving a self-regulatory organization defined in the Securities Exchange Act of 1943, the Commodity Exchange Act or regulations adopted under these acts. [FN38]

Nonwaivable Provisions

Although arbitration is a matter of contract, the AZ-RUAA provides that certain aspects of the arbitral process cannot be changed regardless of the parties' agreement. Certain provisions of the AZ-RUAA can only be changed after a dispute has arisen, others cannot be changed at any time. Except those provisions of the AZ-RUAA specifically enumerated in section 12-3004(B) and (C), the parties to an arbitration agreement "may vary the effect of" [FN39] the requirements of the AZ-RUAA "to the extent permitted by law." [FN40]

The provisions set forth in section 12-3004(B) may be changed by the parties to an arbitration agreement, but not before a dispute arises. [FN41] These are:

- the procedures for applying for judicial relief under section 12-3005; [FN42]
- the definition of which disputes are subject to arbitration under section 12-3006(A); [FN43]
- the provisions regarding interim remedies under section 12-3008;
- the provisions regarding subpoenas and discovery under section 12-3017(A)-(B);
- the provision regarding court jurisdiction to enforce an arbitration award under section 12-3026;
- the prohibition against unreasonable restrictions under section 12-3009 regarding notice of the initiation of an arbitration proceeding;
- the prohibition against unreasonable restrictions under section 12-3012 regarding the disclosure of facts by a neutral arbitrator; [FN44] and
- waiver of the right under section 12-3016 to be represented by counsel.

Section 12-3004(C) sets forth those provisions that are not waivable either before or after a dispute arises:

• provisions regarding the applicability of the AZ-RUAA under section 12-3003(A)(1), (3);

• the provisions regarding motions to compel and motions to stay arbitration under section 12-3007;

• provisions regarding arbitral immunity under section 12-3014;

• provisions regarding judicial enforcement of preaward rulings under section 12-3018;

• provisions regarding the modification or correction of an award by the court under section 12-3020(D)-(E);

• the provision regarding the confirmation of an award under section 12-3022;

• the provisions regarding judicial review of arbitration awards under section 12-3023;

• provisions regarding judicial modification or correction of an award under section 12-3024;

• provisions regarding the entry of judgment following the vacatur of an award and court authorization of reasonable costs with respect to a motion to vacate under section 12-3025(A)-(B);

• the provision regarding the directive by the legislature to apply and construe the AZ-RUAA with the objective of promoting "uniformity of the law with respect to its subject matter among states that enact it" under section 12-3028;

• the provision in section 12-3029 stating that references in the AZ-RUAA to electronic records and electronic signatures are in compliance with the Electronic Signatures Act; and

• the provision making the AZ-RUAA the exclusive process for resolving disputes under the State of Arizona's procurement law. [FN45]

There appears to be an error in section 12-3004 because there is a reference to appeal procedures in both subsection (B) and subsection (C). Subsection (B) provides that after a dispute arises, parties should have the power to negotiate different rules regarding the appeal from arbitration orders. But subsection (C) provides that the provisions regarding appeals may not be waived at all. The Comments to the RUAA indicate that after a dispute arises, but not before, parties should be free to limit a court's jurisdictional provisions or the provisions regarding appeals. Presumably, a court would resolve the conflict in the AZ-RUAA consistent with the Comments to the RUAA. [FN46]

Applications for Judicial Relief

Applications for judicial relief are made by motions to the court, to be heard "in the manner provided by law or court rule for making and hearing motions." [FN47] However, if a civil action involving the agreement to arbitrate is not pending, notice of an initial motion must be served "in the manner provided by law for the service of a summons in a civil action." [FN48] Otherwise, notice of the motion must be given in the manner provided "by law or court rule for serving motions in pending cases." [FN49]

Arbitrability of Disputes

The AZ-RUAA's definition of disputes subject to arbitration is substantially similar to existing

law, with one important difference:

> An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except on a ground that exists at law or in equity for the revocation of a contract. [FN50]

The AZ-UAA requires a "written agreement" to arbitrate. [FN51] The use of the word "record" in the AZ-RUAA means that an agreement to arbitrate may be in a written agreement or in any "electronic or other medium . . . that is retrievable in perceivable form." [FN52]

This same section of the AZ-RUAA also addresses another aspect of arbitrability--who decides whether a dispute is arbitrable. The AZ-RUAA adopts the general rule that a "court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." [FN53] With the adoption by the Arizona Legislature of S.B. 1504 this provision is now waivable before a dispute arises. [FN54] This is an important change because it makes the AZ-RUAA comparable to the RUAA, which allows this provision to be subject to waiver in a predispute arbitration agreement. [FN55]

Under the FAA, parties can agree that an arbitrator, instead of a court, may decide if a dispute is arbitrable where they "clear[ly] and unmistakabl[y] [agreed to do] so." [FN56] One of the most common arbitration rules, the Commercial Arbitration Rules (the Commercial Rules) of the American Arbitration Association (AAA), includes a provision allowing an arbitrator to "rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." [FN57] This language has been held sufficient to clearly and unmistakably grant to an arbitrator the power to determine the arbitrability of a dispute. [FN58] Because this provision can now be waived under the AZ-RUAA in a predispute arbitration agreement, the AZ-RUAA and the AAA Commercial Rules are consistent with respect to this issue. Therefore, by adopting the AZ-RUAA and incorporating the AAA Commerical Rules in an arbitration agreement, parties have agreed that arbitrability issues will be decided by the arbitrator.

The AZ-RUAA also provides that "an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." [FN59] The authority granted to arbitrators to determine conditions precedent to arbitration is consistent with the general rule that arbitrators are empowered to determine procedural issues that arise out of the parties' dispute. [FN60] The power granted to arbitrators to determine the enforceability of a contract containing an arbitration provision is derived from the so-called "separability doctrine" which views the arbitration clause as a separate agreement within a contract. [FN61] Finally, if a party to a court proceeding challenges the existence of an arbitration agreement or contends that a dispute does not fall within the scope of an arbitration agreement, the arbitration may proceed pending a ruling by the court to stay the arbitration. [FN62]

Motions to Compel or Stay Arbitration

The AZ-RUAA section on motions to compel or stay arbitration, although similar to the

AZ-UAA, [FN63] adds more detail. In a motion to compel arbitration, the court shall order the parties to arbitrate if the "refusing party does not appear or does not oppose the motion." [FN64] If the refusing party opposes the motion, the court "shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate." [FN65] When a motion is made to compel arbitration, the court must stay the pending judicial proceeding, if any, until a ruling is made on the motion. [FN66] If the claim subject to arbitration is severable from the remaining claims in the litigation, the stay may be limited to that claim. [FN67]

If a party moves in court alleging that an arbitration has been "initiated or threatened" but there is no arbitration agreement, the court shall "summarily" decide whether or not to order the parties to arbitrate. [FN68] The term "summarily" means a "trial court should act expeditiously and without a jury trial to determine whether a valid arbitration agreement exists." [FN69]

A motion to compel or stay arbitration must be made in the court where a claim involving a dispute referable to arbitration is pending, or in any court pursuant to the venue provisions of the AZ-RUAA. [FN70] Of course, it goes without saying that a court "may not refuse to order arbitration because the claim . . . lacks merit or grounds for the claim have not been established." [FN71]

Interim Remedies

The AZ-RUAA includes an important new section, not found in the AZ-UAA, [FN72] clarifying an arbitrator's power to grant interim remedies, and providing for the power of a court to grant interim remedies before an arbitration is initiated and even after an arbitration has begun. [FN73] The AZ-RUAA is different than the RUAA which uses the term "provisional remedies." [FN74] An interim remedy would, however, include provisional relief, as well as temporary and preliminary injunctive relief. [FN75] Thus, the meaning of the interim remedy provision of the AZ-RUAA should be the same as the provisional remedy section of the RUAA.

The AZ-RUAA makes clear that an arbitrator has broad power to grant interim relief:

> The arbitrator may issue such orders for interim remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action. [FN76] This section is intended to give arbitrators very broad authority. As the Comments to the RUAA point out, the
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> > case law, commentators, rules of arbitration organizations, and some state statutes are very clear that arbitrators have broad authority to order provisional remedies and interim relief . . . . This authority has included the issuance of measures equivalent to civil remedies of attachment, replevin, and sequestration to preserve assets or to make preliminary rulings ordering parties to undertake certain acts that affect the subject matter of the arbitration proceeding. [FN77]

Under the AZ-RUAA, an interim ruling or order by an arbitrator prior to the issuance of a final award may be incorporated into an award and confirmed by the court. [FN78] A party may move the court for an expedited order confirming the award, in which case the court "shall summarily decide the motion." The court must confirm the award unless the court vacates, modifies or corrects the award under the applicable provisions of the AZ-RUAA.

Addressing the issue of whether seeking interim relief from a court constitutes a waiver of arbitration, the AZ-RUAA provides that before an arbitrator is appointed, upon a showing of "good cause," a court may enter an order for an interim remedy "to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action." [FN79] Even after an arbitrator is appointed, a party may still seek an interim remedy in court but "only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy." [FN80] The AZ-RUAA is clear that by seeking interim relief from a court, a party does not waive the right of arbitration. [FN81]

Initiation of Arbitration

A party initiates an arbitration by giving "notice" to the other parties to the agreement in a "record" in accordance with the parties' agreement, or in the absence of an agreement "by certified mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action." [FN82] The notice must describe the "nature of the controversy and the remedy sought." [FN83] Appearance at a hearing constitutes a waiver to an objection for lack of or insufficiency of notice, unless an objection is made at the outset of the hearing. [FN84]

Consolidation of Arbitration Proceedings

The AZ-RUAA solves a problem common in construction disputes where there are separate arbitration agreements involving related parties and similar or the same issues are subject to different arbitration proceedings. So long as an arbitration agreement does not prohibit consolidation, the AZ-RUAA permits a court to consolidate arbitration proceedings under the following circumstances: [FN85]

1. There are separate arbitration agreements (or separate arbitration proceedings) involving the same parties, or one of the parties has an arbitration agreement (or is in an arbitration proceeding) with a third party;

2. The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

3. The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

4. Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or

prejudice to the rights of or hardship to parties opposing consolidation. [FN86]

Not only is this section a change from the AZ-UAA, it is also a departure from cases under the FAA which have consistently prohibited consolidation of arbitration proceedings absent an agreement permitting consolidation. [FN87]

Appointment, Neutral Arbitrators and Disclosure

The AZ-RUAA is similar to existing law as it provides (1) that the parties' agreed upon method for selecting an arbitrator shall be followed, and (2) if that method fails, and there is no agreement to select an arbitrator or if the arbitrator is unable to act and a successor has not been appointed, the court is authorized to appoint the arbitrator. [FN88]

The rules for appointment and disclosure differ depending upon whether the arbitrator is to be a neutral arbitrator or a non-neutral arbitrator. Neutral arbitrators are expected to be "independent and impartial." [FN89] Non-neutral arbitrators, on the other hand, "may be predisposed toward the party who Appointed them." [FN90] The AZ-RUAA contains a specific prohibition regarding the appointment of neutral arbitrators. Neutral arbitrators may not have a "known, direct and material interest in the outcome of the arbitration proceeding or a known, existing and substantial relationship with a party." [FN91] This provision may be waived by the parties, even in a predispute arbitration agreement, [FN92] because parties "may choose to have a person with the type of interest or relationship described in this subsection serve as a neutral arbitrator." [FN93]

Although the Code of Ethics for Arbitrators in Commercial Disputes and arbitration rules of the prominent administering agencies provide that arbitrators shall make certain disclosures to the parties before accepting appointment, the AZ-UAA has no such requirement. [FN94] The AZ-RUAA has changed that. All arbitrators, whether they are neutral or non-neutral arbitrators, before accepting an appointment, after making a "reasonable inquiry," [FN95] must disclose to all parties and to the other arbitrators "any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator." [FN96] This is an objective standard. [FN97] This obligation may be waived completely in a predispute agreement by the parties as to non-neutral arbitrators, and may be waived as to neutral Arbitrators so long as the disclosure obligation is not unreasonably restricted. [FN98] This information includes, but is not limited to, any financial or personal interest in the outcome of the arbitration proceeding and any existing or past relationship with any of the parties, their counsel, a witness or another arbitrator. [FN99] This obligation continues after appointment. [FN100]

The AZ-RUAA links the issue of disclosure to the grounds on which an arbitration award may be vacated. First, if an arbitrator discloses information that would likely be considered to affect the impartiality of the arbitrator and a party timely objects to the appointment or continued service of the arbitrator, the objection "may" be a ground for vacating the award. [FN101] Second, if the arbitrator fails to disclose such information, the failure to disclose the information also may constitute a ground on which to vacate the award. [FN102]

Although the statute is silent on this point, the Comments to the RUAA indicate that the basis

for vacatur is quite limited with respect to the lack of disclosure by non-neutral arbitrators. According to the Comments, [FN103] with respect to a non-neutral arbitrator, an award would be vacated only where the arbitrator fails to disclose information that amounts to "corruption," [FN104] or "misconduct prejudicing the rights of a party." [FN105] Moreover, as to non-neutral arbitrators, disclosure requirements may be waived in their entirety. [FN106]

There is a specific consequence if a neutral arbitrator fails to disclose a "known, direct and material interest in the outcome of the arbitration or a known, existing and substantial relationship with a party." In such cases, the arbitrator is "presumed" to act with evident partiality. [FN107] In a predispute arbitration agreement, the parties cannot "unreasonably restrict" the obligations of neutral arbitrators to disclose facts required by this section. [FN108] Finally, if the parties' arbitration agreement adopts particular procedures for challenges to an arbitrator, "substantial compliance" with those procedures is required as a condition precedent to a motion to vacate an award on the grounds set forth in section 12-3023(A)(2). [FN109]

Immunity

Although the Arizona Supreme Court has recognized that individuals such as arbitrators who perform quasi-judicial functions "are clothed with an immunity analogous to judicial immunity," [FN110] until the adoption of the AZ-RUAA no Arizona statute granted such immunity to arbitrators. This immunity applies not only to the arbitrator, but to an "arbitration organization" as well. [FN111] Arbitral immunity is defined as follows:

> An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this state acting in a judicial capacity. [FN112]

The immunity granted by statute is intended to supplement "any immunity under other law." [FN113] "[A]rbitral immunity has a two-fold goal; to protect arbitrators from suit, and to ensure that there is a body of individuals willing to perform the service." [FN114] Arbitral immunity is not lost despite the failure of an arbitrator to make proper disclosures under section 12-3012. [FN115]

With two exceptions, where an arbitrator's ruling is the subject of litigation, neither the arbitrator nor a representative of an arbitration organization is "competent to testify" regarding the matter, nor can either be required to produce records as to any "statement, conduct, decision or ruling occurring during the arbitration proceeding, to the same extent as a judge . . . acting in a judicial capacity." [FN116] The first exception involves claims by an arbitrator or arbitration organization "against a party to the arbitration proceeding." [FN117] It would seem that this situation would arise only where a claim is brought against a party for nonpayment of fees. If a claim is brought by an arbitrator to collect fees, and a counterclaim is brought attacking the arbitration award, the arbitrator would be allowed to testify as to the claim for fees, but the "arbitrator cannot be required to testify or produce records as to the party's counterclaim attacking the merits of the award." [FN118]

The second exception concerns the situation where a motion to vacate an award is made on the

grounds set forth in section 12-3023(A)(1) and (2), and where a prima facie case for vacating the award is made. [FN119] These provisions involve claims that an award was "procured by corruption, fraud or other undue means" or where there was "evident partiality" by a neutral arbitrator, corruption by an arbitrator or "misconduct by an arbitrator prejudicing the rights of a party."

If an action is brought against an arbitrator or an arbitration organization or its representative, or if a party seeks to compel testimony or the production of documents from the foregoing, and if a court finds that immunity applies or if it finds the arbitrator not competent to testify, the court "shall" award the arbitrator, arbitrator organization or their representative reasonable attorneys' fees and other reasonable expenses of litigation. [FN120]

The Arbitration Process

The procedures governing an arbitration hearing are set forth in section 12-3015. [FN121] This section establishes default rules, as it is one of the sections of the AZ-RUAA that can be waived by the parties in a predispute arbitration agreement. [FN122] Under these default rules, an arbitrator "may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding." [FN123] Consistent with the arbitrator's power to manage the arbitral process, an arbitrator may hold conferences with the parties before the arbitration hearing and "among other matters . . . determine the admissibility, relevance, materiality and weight of any evidence." [FN124]

Like the AZ-UAA, the AZ-RUAA provides that at the hearing, the parties have a "right to be heard, to present evidence material to the controversy and to cross-examine witnesses." [FN125] Clarifying an area of uncertainty under the existing law, the AZ-RUAA grants to arbitrators the power to decide a request for summary disposition of a claim or issue. [FN126] This would presumably include requests comparable to motions to dismiss for failure to state a claim for relief, motions for judgment on the pleadings, and motions for summary judgment. The arbitrator is permitted to grant summary disposition if all parties agree or if one party makes a request for summary disposition and the other party has a reasonable opportunity to respond. [FN127]

The AZ-RUAA establishes a number of procedural requirements for the scheduling of the arbitration hearing: [FN128]

1. The arbitrator shall set the time and place of the hearing and give notice at least five days before the hearing begins. Unless a party objects to the sufficiency of the notice at the beginning of the hearing, the party's appearance waives the objection.

2. A hearing may be adjourned at the request of a party, for good cause shown, or on the arbitrator's own initiative.

3. A hearing may not be postponed to a time later than that set forth in the arbitration agreement unless the parties agree to a later date.

4. A decision may be made based on the evidence "produced" even if a party who was

notified of the hearing does not appear.

5. A court may direct an arbitrator to conduct the hearing "promptly" and render a "timely" decision.

6. A party to an arbitration proceeding may be represented by a lawyer. [FN129]

In addition to establishing greater detail for the regulation of the arbitration process, the AZ-RUAA grants to arbitrators substantial authority in compelling the attendance of witnesses at arbitration proceedings. Arbitrators may issue subpoenas for the attendance of a witness, and for the production of records and "other evidence" at any hearing, and may administer oaths. [FN130] The method for service of a subpoena is not waivable in a predispute arbitration agreement; [FN131] a subpoena must be served in the same manner as a subpoena in a civil action. [FN132] "All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action" in an Arizona court. [FN133]

Unlike the AZ-UAA, the AZ-RUAA contemplates greater use of depositions in arbitration. To make the arbitration proceeding "fair, expeditious and cost effective," a party, or a witness, can request that the arbitrator permit a deposition to be used as evidence. [FN134] With respect to discovery in general, discovery is permissible "as the arbitrator decides is appropriate . . . taking into account the needs of the parties . . . and other affected persons and the desirability of making the proceeding fair, expeditious and cost effective." [FN135] The Comments to the RUAA provide insight into the intent of this provision:

> [U]nless the contract specifies to the contrary, discretion rests with the arbitrators whether to allow discovery. The discovery procedure . . . is intended to aid the arbitration process and ensure an expeditious, efficient and informed arbitration, while adequately protecting the rights of the parties. Because [this section] is waivable . . . the provision is intended to encourage parties to negotiate their own discovery procedures.
>
> At the same time, it should be clear that in many arbitrations discovery is unnecessary and that the discovery contemplated . . . is not coextensive with that which occurs in the course of civil litigation under federal or state rules of **civil procedure**. Although [the section] allows an arbitrator to permit discovery so that parties can obtain necessary information, the intent of the language is to limit that discovery by considerations of fairness, efficiency, and cost. Because [the section] is subject to the parties' arbitration agreement, they can decide to eliminate or limit discovery as best suits their needs. However, the default standard . . . is meant to discourage most forms of discovery in arbitration. [FN136]

A further comment of the Drafting Committee is instructive: "The simplified, straightforward approach to discovery reflected in [this section] is premised on the affirmative duty of the parties to cooperate in the prompt and efficient completion of discovery." [FN137]'

The AZ-UAA is silent on the topic of discovery. Although the Comments to the RUAA

characterize the UAA as not permitting subpoenas and depositions for prehearing discovery, [FN138] the arbitration practice in Arizona typically includes prehearing discovery through subpoenas and depositions. This practice is specifically incorporated in the AZ-RUAA which permits subpoenas and depositions to be used for discovery without distinguishing between party and nonparty witnesses. [FN139] This is a significant departure from the FAA where courts have reached different conclusions over whether an arbitrator has subpoena power to permit prehearing discovery directed at nonparties. [FN140]

The AZ-RUAA grants clear powers to the arbitrator to enforce discovery orders. In addition to the arbitrator's power to issue subpoenas, the arbitrator may order a party to comply with discovery-related orders and "take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action" in Arizona. [FN141] In addition, a party or the arbitrator may seek enforcement of a subpoena from the court "in the manner for enforcement of subpoenas in a civil action." [FN142] Similarly, an arbitrator may also issue protective orders "to prevent the disclosure of privileged information, confidential information, trade secrets and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in" an Arizona court. [FN143]

The AZ-RUAA also is intended to facilitate the arbitration process occurring in another state. An Arizona court is granted the power to enforce a subpoena or discovery order for the attendance of a witness in Arizona or the production of records in Arizona in connection with an arbitration proceeding in another state on "conditions determined by the court so as to make the arbitration proceeding fair, expeditious and cost effective." [FN144] If another state has adopted the RUAA, this provision will assist parties in an Arizona arbitration in obtaining the testimony or production of documents in that state. Under this provision a party may take a subpoena issued by an arbitrator in Arizona directly to a court in the other state where the subpoena can be enforced by that court subject to the provisions of that state's version of the RUAA. [FN145] A subpoena or discovery order issued by an arbitrator in another state must be served in Arizona as provided for under Rule 45 of the Arizona Rules of **Civil Procedure**, and may be enforced as permitted under that Rule. [FN146]

The Arbitration Award

An arbitrator must make a "record" of an award which must be signed or "otherwise authenticated" by each arbitrator who concurs with the award. [FN147] The arbitrator or arbitration organization must give "notice" of the award, including a copy of the award, to each party to the arbitration. [FN148] The notice provision is one that is waivable and can therefore be superseded by the parties' agreement. [FN149]

An arbitration award must be made within the time specified in the parties' arbitration agreement, or if not specified therein, by the court; the parties may agree to extend the time or the court may order that the time be extended. [FN150] A party waives an objection to an untimely award if an objection is not made before the party receives notice of the award. [FN151]

A preaward ruling by an arbitrator may be incorporated into an award. [FN152] When an award incorporates a preaward ruling, the prevailing party may seek from a court an expedited ruling to confirm the award, in which case the court shall summarily decide the issue. [FN153] An arbitrator's decision denying a request for a preaward ruling is not subject to judicial review until after a final award is entered. [FN154] Although preaward rulings are subject to vacatur, modification or correction, there is no provision for an appeal from a court decision on a preaward ruling. [FN155]

Change of Award by the Arbitrator

Although an arbitrator is functus officio and is without authority to redetermine the merits of the arbitration after a final award is made, there are certain exceptions in the AZ-RUAA. [FN156] These exceptions are codified in section 12-3020. [FN157] To change an arbitration award, the moving party must make a motion to the arbitrator within twenty days after the party receives notice of the award. [FN158] An opposition to the motion must be made within ten days thereafter. [FN159] The grounds on which an award may be changed include the following:

- there is an evident mathematical miscalculation or an evident mistake in the description of a person, thing or property in the award;

- the award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted;
- the arbitrator has not made a final and definite award on a claim submitted by the parties to the arbitration proceeding; or
- to clarify the award.

A court can also refer a matter back to the arbitrator to modify or correct an award. If a motion is pending in court to confirm, vacate, modify or correct an award under sections 12-3022 to -3024, the court can submit "a claim" to the arbitrator to modify or correct the award for any of the reasons set forth above. [FN160] If an award is modified or corrected as provided for under section 12-3020, a new award would be issued pursuant to section 12-3019, subject to confirmation, vacatur, and further judicial modification or correction under sections 12-3022 to -3024, respectively. [FN161]

Remedies, Fees and Expenses of Arbitration

Unlike the AZ-UAA which is silent on the issue, [FN162] the AZ-RUAA grants to arbitrators the explicit power to award punitive damages or "other exemplary relief" if such an award is authorized by law in a civil action involving the same claim. [FN163] The evidence presented at the hearing must justify the award of punitive damages under the legal standard otherwise applicable to the claims. [FN164] If an arbitrator awards punitive damages, the arbitrator must specify the facts justifying the award as well as the legal basis of the award; the amount of punitive damages must be stated separately in the award. [FN165]

In a significant change from current law, the AZ-RUAA authorizes an arbitrator to award

attorneys' fees and "other reasonable expenses of arbitration" if an award for fees and expenses "is authorized by law in a civil action involving the same claim," or by agreement of the parties. [FN166] Under the AZ-UAA, citing section 12-1510, the Arizona Supreme Court in Canon School District No. 50 v. W.E.S. Construction Co. held that absent an agreement of the parties, neither an arbitrator nor a court may award attorneys' fees to the prevailing party in an arbitration. [FN167] The AZ-RUAA overrules Canon School District on this issue and authorizes an arbitrator to award attorneys' fees if permissible in a civil action involving the same claim. Therefore, section 12-341.01(A) will be applicable in all arbitrations where a contract claim has been presented. [FN168]

The AZ-RUAA, like the AZ-UAA, grants to arbitrators broad power to fashion remedies, even those that would not be permissible in court:

> As to all remedies other than those authorized by subsections A and B of this section, an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award . . . or for vacating an award . . . . [FN169]

The intent of this provision is to allow

> an arbitrator to order broad relief even that beyond the limits of courts which are circumscribed by principles of law and equity. . . . The purpose of including this language . . . was to insure that arbitrators have a great deal of creativity in fashioning remedies; broad remedial discretion is a positive aspect of arbitration. [FN170]

This section, however, is waivable in a predispute arbitration agreement so that parties can agree to limit or eliminate certain remedies "to the extent permitted by law." [FN171]

The AZ-RUAA also permits an arbitrator to award the expenses of arbitration if an award of expenses is authorized in a civil action. [FN172] Thus, the use of the word "expenses" should have the same meaning as "costs" which are awarded to the successful party in civil litigation. [FN173] In a separate provision, the AZ-RUAA provides that an "arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award." [FN174] This section appears to create a special obligation by the parties to pay the arbitrator's expenses and fees which are not covered by Arizona's cost statutes. The use of the phrase "together with other expenses," is confusing. In general, expenses are covered under section 12-3021(B) and are the same expenses that may be awarded in a civil action involving the same claim--"costs." Expenses of the arbitrator are covered under section 12-3021(D). The only category of expenses seemingly not specifically addressed would be the fees, if any, paid to an arbitration organization. This is certainly an expense of arbitration and presumably is included within the phrase "other expenses."

Confirmation, Vacatur and Modification of the Award

After a party receives notice of an award, a party may move the court for an order confirming the award. The court "shall issue a confirming order" unless the award is modified or vacated. [FN175] The AZ-RUAA contains no time limit within which such a motion must be filed. [FN176] The Drafting Committee of the RUAA rejected language from the FAA that limits such a motion to one year. The Comments to the RUAA indicate it was the "consensus" of the Drafting Committee that a state's general statute of limitations for the filing and execution of a judgment should apply. [FN177] In Arizona there is a five-year statute of limitations for actions brought to execute on a judgment. [FN178]

The AZ-RUAA is significantly different than the AZ-UAA with respect to the interplay between motions to confirm an award and opposition to confirmation. Under the AZ-UAA, after a party moves to confirm an award, the award will be confirmed after the expiration of twenty days, unless the opposing party moves to vacate the award. [FN179] In contrast, under the AZ-RUAA, a party may move to vacate an award up to ninety days after the party receives notice of the award or up to ninety days after the moving party receives notice of a modified or corrected award. [FN180] If the moving party alleges that the award was "procured by corruption, fraud or other undue means," the motion must be made within ninety days after the party learns of the basis of the motion or when the basis should have been known through the exercise of reasonable care. [FN181] Thus, even if a party promptly moves to confirm an award, the AZ-RUAA requires that before an award is confirmed, a court must wait ninety days from when the opposing party received notice of the award. In some cases, that delay could be very disadvantageous to the prevailing party. [FN182]

The statutory grounds set forth in the AZ-RUAA providing for judicial review of arbitration awards are: [FN183]

- the award was procured by corruption, fraud or other undue means; [FN184]
- there was evident partiality by an arbitrator appointed as a neutral arbitrator; [FN185]
- there was corruption by an arbitrator;
- there was misconduct by an arbitrator prejudicing the right of a party to the arbitration proceeding;
- the arbitrator refused to postpone the hearing on showing of sufficient cause;
- the arbitrator refused to consider evidence material to the controversy;
- the arbitrator conducted the hearing contrary to the provisions in section 12-3015 so as to prejudice substantially the rights of a party to the arbitration; [FN186]
- the arbitrator exceeded the arbitrator's powers; [FN187]
- there was no agreement to arbitrate unless the person participated in the arbitration without raising an objection at the outset of the proceeding; [FN188] or
- the arbitration was conducted without proper notice of the initiation of the proceeding so as to prejudice substantially the rights of a party. [FN189]

If an award is vacated on any ground other than where there is no agreement to arbitrate, a court may order a rehearing. [FN190] If an award is vacated because the award is procured by "corruption, fraud or other undue means," or because of "corruption by an arbitrator," the rehearing must be held before a new arbitrator. [FN191] If an award is vacated on any other ground, the new hearing may be held before the arbitrator who made the award or the arbitrator's successor. [FN192] Upon rehearing, an award must be entered within the same time as applicable to the initial award. [FN193]

An important related issue was the subject of a United States Supreme Court decision involving federal arbitration law. In Hall Street Associates, LLC v. Mattel, Inc. [FN194] the United States Supreme Court held that the grounds for judicial review of arbitration awards under the FAA were exclusive. The Supreme Court found unenforceable an arbitration agreement which provided that any arbitration award could be reviewed for errors of law or where there was a lack of substantial evidence to support any findings of fact. The decision in Hall Street Associates has called into question whether nonstatutory grounds for judicial review of arbitration awards remain possible under the FAA. The Ninth Circuit has held that the common law doctrine of manifest disregard of the law does remain viable as falling within the provision of the FAA that permits judicial review of an arbitration award when arbitrators have exceeded their powers. [FN195]

The Comments to the RUAA offer insight into the thinking of the Drafting Committee on this issue. The Drafting Committee specifically declined to include manifest disregard of the law as a basis for judicial review as well as another nonstatutory ground for judicial review--where an award violates public policy. [FN196] Although the AZ-RUAA does not expressly provide that these nonstatutory grounds may be used to vacate an arbitration award, according to the Drafting Committee, "[b]ecause these bases for vacating arbitral awards have traditionally been nonstatutory, courts may still use these standards in appropriate cases." [FN197]

A matter of great debate among the Drafting Committee members concerned whether to expressly include in the RUAA a provision permitting a court to vacate an award on grounds the parties themselves negotiated, like the provisions which were the subject of the decision in Hall Street Associates. [FN198] Although specific language was omitted from the RUAA to enable this, the Drafters contemplated that such a so-called "opt-in" provision would be permissible where authorized under applicable law. The Comments provide:

> This decision not to include in the RUAA a statutory sanction of expanded judicial review of the "opt-in" device effectively leaves the issue of the legal propriety of this means for securing review of awards to the developing case law under the FAA and state arbitration statutes. Consequently, parties remain free to agree to contractual provisions for judicial review of challenged awards, on whatever grounds and based on whatever standards they deem appropriate until the courts finally determine the propriety of such clauses. [FN199]

Although the Drafting Committee did not foreclose completely the availability of an opt-in provision, or whether the nonstatutory grounds of vacatur (e.g., manifest disregard of the law, violation of public policy) are available to review arbitration awards, these may be in doubt in light of prior Arizona cases holding that judicial review of arbitration awards is limited to statutory

grounds. [FN200]

Modification or Correction of an Award

In a provision virtually identical to existing law, the AZ-RUAA permits a party to move a court to modify or correct an award within ninety days of receiving notice of the award or within ninety days of receiving notice of a ***518** modified or corrected award. [FN201] A court must correct or modify an award where (1) there was an evident mathematical miscalculation or an evident mistake in the description of a person or thing or property referred, (2) the arbitrator made an award on a claim not submitted and the award may be corrected without affecting the merits of the decision, or (3) the award is imperfect in a matter of form not affecting the merits of the decision. If a motion under this section is granted, the court "shall" modify or correct the award, and, unless a motion to vacate the award is pending, confirm the award as modified or corrected. [FN202] A motion to modify or correct an award may be joined with a motion to vacate the award. [FN203]

Judgment on Award

Upon granting an order vacating an award without directing a rehearing, confirming an award, or modifying or correcting an award, the court must enter a judgment accordingly. [FN204] In such a proceeding, [FN205] as well as in "subsequent judicial proceedings," [FN206] a court may allow "reasonable costs." Furthermore, in the event of a contested proceeding, the court may confirm an award, vacate an award, modify or correct an award, or award the prevailing party reasonable attorneys' fees and other reasonable expenses where an award is vacated, without a rehearing or modification or correction. [FN207] The purpose of this section is to promote the "statutory policy of finality of arbitration awards," because the "[p]otential liability for the opposing parties' post-award litigation expenditures will tend to discourage all but the most meritorious challenges of arbitration awards." [FN208]

Jurisdiction

Regardless of whether parties have agreed to conduct their arbitration in Arizona, any Arizona court having jurisdiction over the dispute and the parties may enforce an agreement to arbitrate. [FN209] On the other hand, where the parties' arbitration agreement provides that the arbitration is to occur in Arizona, then an Arizona court has exclusive jurisdiction to enter judgment on an award. [FN210] In other words, the location of arbitration determines if a court has jurisdiction to confirm an arbitration award. [FN211] The purpose of this latter provision is to "prevent forum-shopping in confirmation proceedings and to allow party autonomy in the choice of location of the arbitration and its subsequent confirmation proceedings." [FN212]

Venue

Motions made under the AZ-RUAA must be made in the court of the county where the agreement to arbitrate specifies the arbitration is to be held or where the hearing actually has been held. [FN213]

If a location is not specified in the arbitration agreement or if the arbitration has not been held, venue is proper in the superior court of any Arizona county in which an adverse party resides or has a place of business. If the adverse party does not reside in Arizona or does not have a place of business in Arizona, venue is proper in any county. [FN214] Unless a court directs otherwise, all subsequent motions must be made in the court hearing the initial motion.

Appeals from Arbitration Awards

Although there are special statutes applicable to the appeal from arbitration awards, appeals shall be taken in the "manner and to the same extent" as from orders and judgments in civil cases. [FN215] Only the numbering of several provisions in the AZ-UAA was changed by the AZ-RUAA. Under the AZ-RUAA appeals may be taken from the following arbitration awards:

- an order denying an application to compel arbitration; [FN216]
- an order granting an application to stay arbitration; [FN217]
- an order denying confirmation of an award; [FN218]
- an order modifying or correcting an award; [FN219]
- an order vacating an award without directing a rehearing; [FN220] or
- any judgment or decree. [FN221]

Although no explicit statutory basis exists to appeal an order compelling arbitration, the Arizona Supreme Court has authorized a procedure to obtain appellate review of such orders in certain circumstances. In Southern California Edison Co. v. Peabody Western Coal Co., [FN222] the court held that in complex cases where a genuine dispute exists over arbitrability, the party contesting arbitrability should request that the trial court issue a Rule 54(b) judgment, thus permitting an immediate appeal. If the trial court refuses to do so, the party should file a Special Action in the Arizona Court of Appeals where the standard of review of the trial court's determination should be an abuse of discretion.

Conclusion

The law of arbitration has changed dramatically since the promulgation of the UAA in 1955 and its adoption in Arizona in 1962. The promulgation of the RUAA in 2000 and its subsequent adoption by the Arizona Legislature in 2010 brings Arizona's arbitration laws current with the expanded use of arbitration in Arizona by addressing the many issues that arise in arbitration disputes. As arbitration law continues to become more uniform throughout the country, lawyers, and their clients, will benefit knowing that arbitration procedures will be the same, or similar, wherever, and whenever, a dispute subject to arbitration arises.

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[FN1]. The Revised Uniform Arbitration Act was first introduced in the Arizona Legislature in 2002, H.B. 2491, 45th Leg., 2d Reg. Sess. (Ariz. 2002), and each year thereafter (except 2009) until adopted in 2010. H.B. 2430, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[FN2]. Unif. Arbitration Act, 7 U.L.A. 1-98 (2009) [hereinafter RUAA].

[FN3]. Alaska Stat. Ann. §§ 09.43.300-.595 (West, Westlaw through 2010 2d Reg. Sess.); Colo. Rev. Stat. Ann. §§ 13-22-201 to -230 (West, Westlaw through chs. 1-6 of the 2011 1st Reg. Sess.); D.C. Code §§ 16-4401 to - 4430 (Westlaw through Jan. 11, 2011); Haw. Rev. Stat. Ann. §§ 658A-1 to -29 (West, Westlaw through 2010 Reg. & Spec. Sess.); Nev. Rev. Stat. Ann. §§ 38.206-248 (West, Westlaw through 2009 Reg. Sess. & 2010 26th Spec. Sess.); N.J. Stat. Ann. §§ 2A:23B-1 to -30 (Westlaw through 2011 Legis. Sess.); N.M. Stat. Ann. §§ 44-7A-1 to -30 (West, Westlaw through 2010 Legis.); N.C. Gen. Stat. §§ 1-569.1 to -569.30 (West, Westlaw through 2010 Reg. Sess.); N.D. Cent. Code §§ 32-29.3-01 to -29 (West, Westlaw through 2009 Reg. Sess.); Okla. Stat. tit. 12 §§ 1851-1881 (Westlaw through 2010 2d Reg. Sess.); Or. Rev. Stat. §§ 36.600-740 (West, Westlaw through 2010 Spec. Sess.); Utah Code Ann. §§ 78B-11-101 to -130 (West, Westlaw through 2010 Gen. Sess.); Wash. Rev. Code Ann. §§ 7.04A.010-900 (West, Westlaw through 2011 Legis.); 2010 Minn. Sess. Law Serv. 264 (West). See generally Matthew E. Braun, The Revised Uniform Arbitration Act, 18 Ohio St. J. Disp. Resol. 237 (2002); Timothy J. Heinsz, The Revised Uniform Arbitration Act: Modernizing, Revising and Clarifying Arbitration Law, 2001 J. Disp. Resol. 1 (2001); Mark E. Lassiter, Arizona's New Revised Uniform Arbitration Act, Ariz. Att'y, Nov. 2010, at 30. Timothy Heinsz, the former Dean of the University of Missouri School of Law, was the Reporter to the Drafting Committee of the RUAA.

[FN4]. H.B. 127, 25th Leg., 2d Reg. Sess. (Ariz. 1962).

[FN5]. Heinsz, supra note 3, at 2.

[FN6]. RUAA, Prefatory Note.

[FN7]. Ariz. Rev. Stat. Ann. § 12-3028 (Westlaw through 2011 Legis. Sess.). Therefore, it is appropriate to look to the decisions of other courts for "guidance." States which have adopted the RUAA have found this language to mean that it is appropriate to consider the Comments to the RUAA in interpreting its provisions. Prime Props., Inc. v. Leahy, 228 P.3d 617, 620-21 (Or. Ct. App. 2010); Townsend v. Quadrant Corp., 224 P.3d 818, 824 n.7 (Wash. Ct. App. 2009).

[FN8]. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). Arizona courts have consistently held that the public policy of Arizona favors arbitration as a means of resolving disputes. E.g., Jeanes v. Arrow

Ins. Co., 494 P.2d 1334, 1336 (Ariz. Ct. App. 1972).

[FN9]. Southland, 465 U.S. at 11; see 9 U.S.C. § 2 (Westlaw through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, 111-350, 111-377, and 111-383)).

[FN10]. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273 (1995).

[FN11]. Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57 (2003).

[FN12]. Sovak v. Chugai Pharm. Co., 280 F.3d 1266, 1269 (9th Cir. 2002).

[FN13]. See Volt Info. Sci., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

[FN14]. Fid. Fed. Bank v. Durga Ma Corp., 386 F.3d 1306, 1311 (9th Cir. 2004) (citation omitted).

[FN15]. See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

[FN16]. See Johnson v. Gruma Corp., 614 F.3d 1062, 1066-67 (9th Cir. 2010).

[FN17]. RUAA, Prefatory Note. As an alternative to, or in addition to, adopting a state's arbitration law, where an arbitration is governed by the FAA, parties may choose, and customarily do choose, to incorporate into their agreement the procedural rules of an arbitration organization such as the American Arbitration Association. However, the FAA's procedural provisions do not apply in state court proceedings. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 597 (Cal. 2008).

[FN18]. Other than defining the term "court" as the "superior courts of the state of Arizona," Ariz. Rev. Stat. Ann. § 12-1516 (Westlaw through 2011 Legis. Sess.), the AZ-UAA contains no definitional section. Other definitions in the AZ-RUAA include the following. An "arbitration organization" is defined as an "association, agency, board, commission or other entity that is neutral and that initiates, sponsors or administers an arbitration proceeding or is involved in the appointment of an arbitrator." Id. § 12-3001(1). An "arbitrator" is an "individual who is appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate." Id. § 12-3001(2). A "court" is a "court of competent jurisdiction in this state." Id. § 12-3001(3). "Person" under the AZ-RUAA is defined as an "individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government or governmental subdivision, agency or instrumentality or public corporation or any other legal or commercial entity." Id. § 12-3001(5).

[FN19]. Id. § 12-3001(6). The purpose of this definition is to "accommodate the use of electronic evidence in business and governmental transactions." RUAA § 1 cmt. 5. This definition is found in a number of other Arizona statutes. E.g., Ariz. Rev. Stat. Ann. § 12-2238(G)(2) (mediation privilege statute); id. § 14-10005(C)(1) (Uniform Disclaimer of Property Interests Act); id. § 47-1201(B)(31)

(Uniform Commercial Code); id. § 47-5102(A)(14) (Uniform Commercial Code).

[FN20]. Ariz. Rev. Stat. Ann. § 12-1501.

[FN21]. "In this time of e-commerce, businesses and consumers will conduct more and more transactions by electronic means, and this changed technology will transform the manner in which parties arbitrate disputes .... The RUAA takes account of this shift in business operations in a number of ways and seeks to accommodate even electronic arbitration (e-arbitration)." Heinsz, supra note 3, at 9.

[FN22]. Ariz. Rev. Stat. Ann. § 12-3019(A).

[FN23]. 15 U.S.C. §§ 7001, 7002 (Westlaw through P.L. 112-3 (excluding P.L. 111-296, 111-314, 111-320, 111-350, 111-377, and 111-383)). This act provides that in transactions affecting interstate or foreign commerce, a "contract or other record relating to the transaction shall not be denied legal effect merely because it is in electronic form." Cloud Corp. v. Hasbro, Inc., 314 F.3d 289, 295 (7th Cir. 2002).

[FN24]. Ariz. Rev. Stat. Ann. § 12-3001(4). Actual knowledge "is not intended to include imputed knowledge or constructive knowledge." RUAA § 1 cmt. 4.

[FN25]. Ariz. Rev. Stat. Ann. § 12-3002.

[FN26]. Id. § 12-3009(A).

[FN27]. Id. § 12-3019.

[FN28]. The manner of notice with respect to the initiation of an arbitration is specific, and takes precedence over the notice provisions in this section. See infra note 83 and accompanying text.

[FN29]. Ariz. Rev. Stat. Ann. § 12-3002(A). The definition of notice "spells out standards for when notice is given and received rather than requiring any particular means of notice. This allows parties to use systems of notice that become technologically feasible and acceptable, such as fax or electronic mail." RUAA § 2 cmt. 1.

[FN30]. Linsenmayer v. Omni Homes, Inc., 668 S.E.2d 388, 391-92 (N.C. Ct. App. 2008). In that case the defendants did not appear at the arbitration hearing and an award was entered ordering the defendants to pay over $300,000 in damages and attorneys' fees. The arbitrator sent the hearing notice to the address on file of the defendants' representative. The defendants changed their address but did not inform the arbitrator. The court held it was sufficient to send the notice to the representative's place of business. The court observed that the arbitrator also sent notice to the defendants' attorney as well as to the attorney who took over representation of the defendants. Citing the comparable provisions of North Carolina's arbitration law, the court held that "[a]ctual receipt is not required by

the statute." Id.

[FN31]. Ariz. Rev. Stat. Ann. § 12-3001(4).

[FN32]. Id. § 12-3002(B).

[FN33]. Id. § 12-3002(C).

[FN34]. Id . § 12-3003(A)(1)-(2). In Snider v. Prod. Chem. Mfr., Inc., 230 P.3d 1, 4 (Or. 2010), the court held that Oregon's adoption of the RUAA applied to the dispute rather than Oregon's former arbitration law because no proceeding was commenced and no right accrued before January 1, 2004, the date set forth in the comparable provision of Oregon's arbitration statute. Although prior to January 1, 2011, parties were free to follow the AZ-RUAA, there is uncertainty regarding the enforceability of any such agreement because section 6 of H.B. 2430 provides that the law was not effective until December 31, 2010.

[FN35]. Ariz. Rev. Stat. Ann. §12-3003(A)(3). By adopting this provision, the "legislature will express a specific intent that the RUAA, on the date which the legislature selects, will have retroactive application as to arbitration agreements entered into prior to the effective date of the legislation." RUAA § 2 cmt. 5. In Arizona, for a statute to have retroactive effect, the legislature must expressly declare its intent that a statute apply retroactively. Ariz. Rev. Stat. Ann. § 1-244 ("No statute is retroactive unless expressly declared therein."); Cheney v. Superior Court, 698 P.2d 691, 694 n.3 (Ariz. 1985).

[FN36]. H.B. 2430 § 5, 49th Leg., 2d Reg. Sess. (Ariz. 2010). Section 5 of H.B. 2430 provides that the AZ-RUAA "does not affect an action or proceeding commenced or a right accrued before January 1, 2011." The Hawaii Supreme Court, considering a similar provision under Hawaii's version of the RUAA, held that because the legislature "would not have intended the absurd result of having parties to an arbitration be subjected to a change of rules while in the midst of an ongoing arbitration proceeding," this provision applies where "arbitration proceedings" are commenced after the operative date in the statute. United Pub. Workers, AFSCME Local 646 v. Dawson Int'l, Inc., 149 P.3d 495, 512 (Haw. 2006); see Rock Work, Inc. v. Pulaski Constr. Co., 933 A.2d 988, 988 (N.J. Super. Ct. App. Div. 2007). The District of Columbia interpreted that jurisdiction's statute in a way that distinguished between the proceeding in the trial court and the proceeding on appeal. In Menna v. Plymouth Rock Assurance Corp., 987 A.2d 458 (D.C. 2010), a motion to compel arbitration was filed in 2007, the year before the District of Columbia's adoption of the RUAA. The appellate court considered the appeal in 2010. Because the District of Columbia statute provided that after July 1, 2009, the RUAA would govern arbitration agreements whenever made, the court held that the RUAA would apply to the appeal.

[FN37]. Ariz. Rev. Stat. Ann. § 12-3003(B)(1). The AZ-UAA also contains an exclusion for "arbitration agreements between employers and employees or their respective representatives." Id. § 12-1517. This provision has been held to exempt employment arbitration agreements from the

AZ-UAA. N. Valley Emergency Specialists, LLC v. Santana, 93 P.3d 501, 502 (Ariz. 2004). Importantly, however, the exclusion in the AZ-RUAA and the AZ-UAA for agreements to arbitrate employment disputes is preempted by the FAA to the extent the agreement involves commerce--an agreement that would fall within the scope of Congress's Commerce Clause power. Under the FAA, with the narrow exception of workers engaged in interstate transportation, all other arbitration agreements between employers and employees in contracts evidencing transactions involving commerce are enforceable. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 105 (2001) (employment disputes are subject to arbitration where subject to the FAA). Because the scope of the FAA is coextensive with Congress's Commerce Clause power, Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995), virtually all employment relationships, to the extent they are subject to congressional legislative power, are covered by the FAA. Because the FAA prohibits the states from making special rules which interfere with the ability of parties to agree to arbitrate their disputes, the exclusion of employment disputes in the AZ-UAA and the AZ-RUAA will be preempted so long as the agreement to arbitrate the dispute falls within the scope of the FAA. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996). See generally Bruce E. Meyerson, Arbitration, in 1 Arizona Employment Law Handbook, art. 1.8 (2010 ed.).

[FN38]. Ariz. Rev. Stat. Ann. § 12-3003(B)(2)-(4). The AZ-RUAA is now the exclusive procedure for asserting claims against the State of Arizona or any state agency relating to any procurement under the Arizona Procurement Code. Id. § 41-2615.

[FN39]. Although the parties' arbitration agreement must be in a "record," except for provisions of the AZ-RUAA that may not be changed, parties "subsequently may vary [the arbitration] agreement orally, for instance, during the arbitration proceeding." RUAA § 4 cmt. 2.

[FN40]. Ariz. Rev. Stat. Ann. § 12-3004(A). The language "to the extent permitted by law" was included by the Drafting Committee "to incorporate ... theories of adhesion and unconscionability into the arbitration process under the RUAA." Heinsz, supra note 3, at 25-26. The purpose of this limitation is "to inform the parties that they cannot vary the terms of an arbitration agreement from the RUAA if the result would violate applicable law." RUAA § 4 cmt. 3. Arizona federal and state courts have applied the doctrine of unconcsionability to arbitration agreements. E.g., Batory v. Sears, Roebuck & Co., 456 F.Supp.2d 1137 (D. Ariz. 2006); Broemmer v. Abortion Servs. of Phoenix, Ltd., 840 P.2d 1013 (Ariz. 1992). Arbitration organizations such as the American Arbitration Association (AAA) offer to parties comprehensive rules to govern their arbitration. These rules are typically incorporated into a predispute arbitration agreement. Unless aspects of such rules fall within the subject matter for which waiver is prohibited, the rules of the arbitration organization will govern the parties' arbitration, even where inconsistent with provisions of the AZ-RUAA.

[FN41]. Parties are able to vary these procedures after a dispute arises because after "a dispute ... arises, the parties should have more autonomy to agree to provisions different than those required under the RUAA." RUAA § 4 cmt. 4.

[FN42]. In 2011, the Arizona Legislature approved a change to section 12-3004(B) by limiting the

prohibition on predispute changes to section 12-3005(A) only. S.B. 1504, 50th Leg., 1st Reg. Sess. (Ariz. 2011). The result of this change is to permit parties to agree in a predispute arbitration agreement on the manner of providing notice when an initial motion is filed in court. See infra note 49 and accompanying text.

[FN43]. S.B. 1504 made a further significant change to section 12-3004(B), limiting the prohibition on predispute changes to section 12-3006(A) only. S.B. 1504 makes section 12-3006(B) subject to waiver before a dispute arises thereby allowing parties in a predispute arbitration agreement to agree that arbitrators may determine issues of arbitrability. See infra notes 54-58 and accompanying text.

[FN44]. There is no restriction on the ability of the parties to change the requirements regarding disclosure by a non-neutral arbitrator. RUAA § 4 cmt. 4(b).

[FN45]. Ariz. Rev. Stat. Ann. § 41-2615.

[FN46]. After a dispute arises, parties may choose "to limit the jurisdictional provisions" of a reviewing court ... or the provisions regarding appeals ... to decide that there will be no appeal from lower court rulings." RUAA § 4 cmt. 4(d). Other than in an adhesion contract, parties should be able to agree that an arbitration award is final and nonappealable, or that the superior court's review of an an arbitration award is final and nonappealable. The suggestion in the Comments that parties can limit a court's jurisdiction would appear contrary to Arizona law. Cf. Rodieck v. Rodieck, 450 P.2d 725, 732 (Ariz. Ct. App. 1969) ("Parties are not allowed to confer jurisdiction over subject matter upon the courts of this state."). But see infra note 183.

[FN47]. Ariz. Rev. Stat. Ann. § 12-3005(A). This provision is identical to existing law. Id. § 12-1515. The rules applicable to motions in the superior court of Arizona appear in Rule 7.1 of the Arizona Rules of **Civil Procedure**.

[FN48]. The rules applicable to the service of a summons appear in Rule 4 of the Arizona Rules of **Civil Procedure**.

[FN49]. Ariz. Rev. Stat. Ann. § 12-3005(B). Although not apparent from the actual language of this section, the Comments to the RUAA indicate that the intent of this section is to permit the parties to an arbitration agreement to agree to another method of providing initial notice of a motion filed in court. RUAA § 5 cmt. 1. By making subsection (B) subject to change in a predispute arbitration agreement, S.B. 1504 has made the AZ-RUAA consistent with the RUAA. S.B. 1504, 50th Leg., 1st Reg. Sess. (Ariz. 2011). The AZ-UAA provides that "[u]nless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action." Ariz. Rev. Stat. Ann. § 12-1515.

[FN50]. Ariz. Rev. Stat. Ann. § 12-3006(A). This section "is intended to include arbitration provisions contained in the bylaws of corporate or other associations as valid and enforceable arbitration agreements." RUAA § 6 cmt. 1. Arizona courts follow federal arbitration law in holding

that arbitration clauses are to be "construed liberally and any doubts as to whether or not the matter in question is subject to arbitration should be resolved in favor of arbitration." New Pueblo Constructors, Inc. v. Lake Patagonia Recreation Ass'n, Inc., 467 P.2d 88, 91 (Ariz. Ct. App. 1970). Parties are permitted to modify a written arbitration agreement by way of a subsequent oral agreement. Eng v. Stein, 599 P.2d 796, 799-800 (Ariz. 1979) (the parol evidence rule does not prevent parties from modifying the original written agreement); RUAA § 6 cmt. 1 ("The language in [this section] as to the validity of arbitration agreements is the same as [the] UAA ... and almost the same as the language of [the] FAA ....").

[FN51]. Ariz. Rev. Stat. Ann. § 12-1501.

[FN52]. Id. § 12-3001(6).

[FN53]. Id. § 12-3006(B). Citing the comparable provision in the Washington statute, the court held that the "trial court, not an arbitrator, generally determines the arbitrability of a dispute." Davis v. Gen. Dynamics Land Sys., 217 P.3d 1191, 1193 (Wash. Ct. App. 2009). Another Washington appellate court summed up the relationship between the provisions in this section this way:

> [I]f a party makes a discrete challenge to the enforceability of the arbitration clause, a court must determine the validity of the clause. If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration. If the court finds as a matter of law that the arbitration clause is not enforceable, all issues remain with the court for resolution, not with an arbitrator. Alternatively, if a party challenges only the validity of the contract as a whole, the arbitrator has the authority ... to determine the validity of the contract.
>
> Townsend v. Quadrant Corp., 224 P.3d 818, 825 (Wash. Ct. App. 2009) (citations omitted).

Neither of the Washington decisions discussed the situation where the parties agree that the arbitrator is permitted to decide issues of arbitrability.

[FN54]. Ariz. Rev. Stat. Ann. § 12-3004(B)(1); S.B. 1504, 50th Leg., 1st Reg. Sess. (Ariz. 2011).

[FN55]. RUAA § 4(a); see Heinsz, supra note 3, at 40.

[FN56]. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 939 (1995). Under the AZ-UAA the "court may have to abstain from deciding the issue of arbitrability ... if the arbitration agreement allows the arbitrator to decide arbitrability." Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1085 n.1 (Ariz. Ct. App. 2003).

[FN57]. American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures, R-7 (2009) [hereinafter AAA Commercial Rules].

[FN58]. Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1371 (Fed. Cir. 2006). By incorporating the AAA Commercial Rules into their arbitration agreement the parties "clearly and unmistakably agreed that the arbitrator would primarily decide the arbitrability of the issues." Brake Masters Sys., 78 P.3d

at 1088.

[FN59]. Ariz. Rev. Stat. Ann. § 12-3006(C). S.B. 1504 makes this provision subject to waiver in a predispute arbitration agreement. In light of the well-established law under the FAA which has been followed in Arizona, it would seem very unlikely that parties would choose to vary this power given to arbitrators. See infra note 60.

[FN60]. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 86 (2002) (procedural questions which grow out of a dispute and bear upon its final disposition are presumptively not for a judge but for an arbitrator to decide). Citing the Comment to the applicable section of the RUAA, an Oregon court held that issues of estoppel and waiver are conditions precedent and therefore issues to be resolved by an arbitrator. Livingston v. Metro. Pediatrics, LLC, 227 P.3d 796, 802 (Or. Ct. App. 2010). Another example of a condition precedent to arbitration is whether a demand for arbitration is timely. City of Cottonwood v. James L. Fann Contracting, Inc., 877 P.2d 284, 291 (Ariz. Ct. App. 1994). Conditions precedent to arbitrability embrace "procedural defenses ... that do not go to the validity" of the arbitration agreement such as "waiver, the statute of limitations and laches." Menna v. Plymouth Rock Assurance Corp., 987 A.2d 458, 465 (D.C. 2010). On the other hand, where it is contended that a party has waived the right to arbitrate by litigating a case in court, judges determine waiver under those circumstances. Bolo Corp. v. Homes & Son Constr. Co., 464 P.2d 788, 790-91 (Ariz. 1970).

[FN61]. Arbitration agreements are considered an agreement independent and separate from the principal contract. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 409 (1967). This so-called separability doctrine is followed in Arizona. U.S. Insulation, Inc. v. Hilro Constr. Co., 705 P.2d 490, 493 (Ariz. Ct. App. 1985). Arizona follows the federal rule that the enforceability of contracts containing an arbitration clause is determined by an arbitrator. Id.; see Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006).

[FN62]. Ariz. Rev. Stat. Ann. § 12-3006(D). This section "follows the practice of the American Arbitration Association and most other arbitration organizations that if a party challenges the arbitrability of a dispute in a court proceeding, the arbitration organization or arbitrators in their discretion may continue with the arbitration unless a court issues an order to stay the arbitration or makes a final determination that the matter is not arbitrable." RUAA § 6(d) cmt. 6.

[FN63]. Ariz. Rev. Stat. Ann. § 12-1502. Arizona has rejected the so-called "intertwining doctrine" which permits a court to stay an arbitration while related nonarbitrable claims are litigated. Hallmark Indus., LLC v. First Systech Int'l, Inc., 52 P.3d 812, 812-13 (Ariz. Ct. App. 2002).

[FN64]. Ariz. Rev. Stat. Ann. § 12-3007(A)(1). Citing the comparable provision in the Hawaii arbitration statute, the Hawaii Supreme Court held that a motion to compel arbitration cannot be filed until a party has first attempted to initiate an arbitration. Ueoka v. Szymanski, 114 P.3d 892, 901 (Haw. 2005).

[FN65]. Ariz. Rev. Stat. Ann. § 12-3007(A)(2). The word "summarily" in the comparable provision of the Oregon statute was held to mean "expeditiously and without a jury." Greene v. Salomon Smith Barney, Inc., 209 P.3d 333, 336 (Or. Ct. App. 2009); see also J.A. Walker Co. v. Cambria Corp., 159 P.3d 126, 130 (Colo. 2007) (if material facts are undisputed, the trial court should resolve the dispute on the record before it; if material facts are in dispute, the court should "proceed expeditiously" to hold a hearing).

[FN66]. Ariz. Rev. Stat. Ann. § 12-3007(F).

[FN67]. Id. § 12-3007(G).

[FN68]. Id. § 12-3007(B)-(C).

[FN69]. RUAA § 7 cmt.

[FN70]. Ariz. Rev. Stat. Ann. § 12-3007(E). The venue provisions of the law are found in section 12-3027.

[FN71]. Id. § 12-3007(D).

[FN72]. Even though the AZ-UAA does not contain a provision pertaining to interim relief, the AAA Commercial Rules permit an arbitrator to "take whatever ... measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." AAA Commercial Rules, R-34(a). This rule, when incorporated by parties into their arbitration agreement, has been held sufficient to permit an arbitrator to grant interim remedies. See CSA-Credit Solutions of Am., Inc. v. Schafer, 408 F. Supp. 2d 503, 511-12 (W.D. Mich. 2006).

[FN73]. Ariz. Rev. Stat. Ann. § 12-3008.

[FN74]. RUAA § 8. A provisional remedy in Arizona includes the "remedies of attachment, garnishment or replevin, but shall not include garnishment of wages." Ariz. Rev. Stat. Ann. § 12-2401(3).

[FN75]. Andrew Brown Co. v. Painters Warehouse, Inc., 466 P.2d 790 (Ariz. Ct. App. 1970) (provisional remedy of replevin referred to as an interim remedy).

[FN76]. Ariz. Rev. Stat. Ann. § 12-3008(B)(1).

[FN77]. RUAA § 8 cmt. 4.

[FN78]. Ariz. Rev. Stat. Ann. § 12-3018.

[FN79]. Id. § 12-3008(A). According to the Comments to the RUAA, see RUAA § 8 cmt. 3, this

provision is derived from cases such as Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 215 (7th Cir. 1993), where the court upheld the decision of the district court granting a temporary restraining order prior to the initiation of the arbitration because it "served to maintain the status quo without prejudice to the merits of any of the parties' claims or defenses until an arbitration panel could consider the issues presented." Although not explicit in the statute, the Comments to the RUAA provide that after "a court makes a ruling [under this section] an arbitrator is allowed to review the ruling in appropriate circumstances." RUAA § 8 cmt. 6.

[FN80]. Ariz. Rev. Stat. Ann. § 12-3008(B)(2). The Comments to the RUAA suggest that the court's role under these circumstances should be "limited." RUAA § 8 cmt. 3.

[FN81]. Ariz. Rev. Stat. Ann. § 12-3008(C). In Bolo Corp. v. Homes & Son Constr. Co., 464 P.2d 788, 788-93 (Ariz. 1970), Homes began the dispute by commencing garnishment proceedings and by filing a complaint seeking money damages. The court held that by filing a complaint seeking money damages, the same relief Homes was entitled to under its arbitration agreement, Homes had waived the right to arbitrate. In a later decision, the court of appeals explained that Bolo Corp. does not stand for the proposition that seeking provisional relief alone constitutes a waiver of the right to arbitrate. See Bancamerica Commercial Corp. v. Brown, 806 P.2d 897, 900 (Ariz. Ct. App. 1990) (arbitration clause did not preclude recourse to the judicial remedy of attachment). Moreover, in subsequent decisions, Arizona courts have held that the mere filing of a complaint is insufficient to constitute waiver of the right to arbitrate. See, e.g., Noel R. Shahan Irrevocable & Inter Vivos Trust v. Staley, 932 P.2d 1345, 1349 (Ariz. Ct. App. 1997); EFC Dev. Corp. v. F.F. Baugh Plumbing & Heating Inc., 540 P.2d 185, 188 (Ariz. Ct. App. 1975).

[FN82]. Ariz. Rev. Stat. Ann. § 12-3009(A). There is no similar provision in the AZ-UAA. Under Colorado's comparable provision, its court of appeals held that a letter did not give notice of the initiation of arbitration where, among other things, it only referred to a contract containing an arbitration provision, without mentioning arbitration, or when the dispute would be submitted to arbitration. See Braata, Inc. v. Oneida Cold Storage Co., 2010 WL 3448824 (Colo. Ct. App. Sept. 2, 2010). The formal requirements for initiating an arbitration apply even if a party is not seeking a "claim" against the other party but starting an arbitration based upon an anticipated claim of the adverse party. Ueoka v. Szymanski, 114 P.3d 892, 900-01 (Haw. 2005). Notice must be given to all parties to the arbitration agreement "not just to the party against whom a person files an arbitration claim." RUAA § 9 cmt. 4. Insufficient notice of an arbitration alone will not result in vacatur of an award. There must also be "prejudice substantially" affecting the "rights of a party." Ariz. Rev. Stat. Ann. § 12-3023(A)(6).

[FN83]. Id. A rather typical agreement for the initiation of arbitration is found in the AAA Commercial Rules, R-4. A notice of arbitration that simply said one party wanted to proceed with the arbitration of a dispute with the opposing party did not comply with the similar section of Washington's version of the RUAA because it did not describe the nature of the controversy and the remedy sought. See Wescott Homes LLC v. Chamness, 192 P.3d 394, 398 (Wash. Ct. App. 2008).

[FN84]. Ariz. Rev. Stat. Ann. § 12-3009(B).

[FN85]. Id. § 12-3010. According to the Comments, this provision

> makes sense for several reasons. As in the judicial forum, consolidation effectuates efficiency in conflict resolution and avoidance of conflicting results. By agreeing to include an arbitration clause, parties have indicated that they wish their disputes to be resolved in such a manner. In many cases, moreover, a court may be the only practical forum within which to effect consolidation.

RUAA § 10 cmt. 3. This section is not intended to address the validity of arbitration agreements in class-wide disputes. Heinsz, supra note 3, at 16. Because this section can be changed by agreement of the parties, the consolidation provisions in the American Institute of Architects A201, General Conditions, § 15.4.4.1, and Owner Architect Agreement B101, § 8.3.4.1, which permit consolidation without the necessity of court approval, would not be affected even by adopting the AZ-RUAA.

[FN86]. This provision is based on the court rulings that have taken the view that a "court should not require a party requesting consolidation to demonstrate that the parties clearly meant such a result but should apply a standard of whether it is more likely than not that the parties intended consolidation.... Thus, where imposition on contractual expectations will not be substantial, a court should order consolidation." Heinsz, supra note 3, at 14.

[FN87]. E.g., Weyerhaeuser Co. v. W. Seas Shipping Co., 743 F.2d 635, 637 (9th Cir. 1984).

[FN88]. Compare Ariz. Rev. Stat. Ann. § 12-3011(A), with id. § 12-1503. Citing this provision of the Utah arbitration law, the Supreme Court of Utah held that where the parties have agreed on a method for selecting an arbitrator, "that method 'must' be followed." Peterson & Simpson v. IHC Health Servs., Inc., 217 P.3d 716, 720 (Utah 2009). The court is also authorized to appoint an arbitrator if an arbitrator ceases or is unable to act during an arbitration proceeding. Ariz. Rev. Stat. Ann. § 12-3015(E). In Mathews v. Life Care Ctrs. of Am., Inc., 177 P.3d 867, 868 (Ariz. Ct. App. 2008), the Arizona Court of Appeals relied upon A.R.S. § 12-1503, holding that although the parties' arbitration agreement provided for arbitration under the rules of the AAA, the court could appoint an arbitrator because the AAA was no longer administering predispute arbitration agreements between patients and healthcare facilities.

[FN89]. The Code of Ethics for Arbitrators in Commercial Disputes, Note on Neutrality (Mar. 1, 2004) [hereinafter Code of Ethics], available at http://www.abanet.org/dispute/commercial_disputes.pdf.

[FN90]. Id. at Canon X(A)(1). Non-neutral arbitrators are often appointed where an arbitration agreement provides that each party is to designate a party-appointed arbitrator, and those arbitrators are to select a third, neutral arbitrator. Under the AAA Commercial Rules, however, party-appointed arbitrators are presumed to be neutral unless the parties designate the party-appointed arbitrators to be non-neutral. AAA Commercial Rules, R-12(b).

[FN91]. Ariz. Rev. Stat. Ann. § 12-3011(B).

[FN92]. See id. § 12-3004(B). Because this provision may be changed only to the "extent permitted by law," in an adhesion agreement, the stronger party cannot unilaterally choose the arbitrator. Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1990).

[FN93]. RUAA § 11 cmt. 1.

[FN94]. AAA Commercial Rules, R-16.

[FN95]. Ariz. Rev. Stat. Ann. § 12-3012(A). What constitutes a reasonable inquiry will vary depending upon the circumstances. "For instance, an attorney in a law firm may be required to check with other attorneys in the firm to determine if acceptance of an appointment as an arbitrator would result in a conflict of interest ...." RUAA § 12 cmt. 3.

[FN96]. Ariz. Rev. Stat. Ann. § 12-3012(A). The meaning of "evident partiality" has been extensively litigated in cases under the FAA. See generally RUAA § 12 cmt. 3. The United States Court of Appeals for the Ninth Circuit has held that to show evident partiality a party must establish "specific facts indicating actual bias toward or against a party" or that the arbitrator failed to disclose information that creates a reasonable impression of bias. Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 645-46 (9th Cir. 2010). In Wages v. Smith Barney Harris Upham & Co., 937 P.2d 715, 716 (Ariz. Ct. App. 1997), the court of appeals held that evident partiality existed where an arbitrator failed to disclose he had brought suit on behalf of investors against the predecessor brokerage company in the arbitration, in one case with virtually identical claims.

[FN97]. RUAA § 12 cmt. 3.

[FN98]. Ariz. Rev. Stat. Ann. § 12-3004(A), (B)(3).

[FN99]. Id. § 12-3012(A)(1)-(2).

[FN100]. Id. § 12-3012(B). The Code of Ethics provides that for "a reasonable period of time after the decision of a case" arbitrators should avoid circumstances that would "reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation" of a particular relationship or interest. Code of Ethics, Canon I(C).

[FN101]. Ariz. Rev. Stat. Ann. § 12-3012(C). A timely objection is one normally made prior to the arbitration hearing or within a reasonable time after the party learns or should have learned of the lack of disclosure. RUAA § 12 cmt. 4. This section is permissive, the intent being to give courts "wider latitude in deciding whether to vacate an award." Id.

[FN102]. Ariz. Rev. Stat. Ann. § 12-3012(D).

[FN103]. RUAA § 12 cmt. 5.

[FN104]. Ariz. Rev. Stat. Ann. § 12-3023(A)(2)(b).

[FN105]. Id. § 12-3023(A)(2)(c).

[FN106]. See id. § 12-3004(B)(3); RUAA § 4 cmt. 4(b).

[FN107]. Ariz. Rev. Stat. Ann. § 12-3012(E). "The shifting of the burden of proof in this limited and somewhat extreme situation will require the neutral, who is in the best position to know the exact nature and extent of the interest or relationship, to explain the matter." Heinsz, supra note 3, at 19. Furthermore, it would be the "burden of the party defending the award to rebut the presumption by showing that the award was not tainted by the non-disclosure or there in fact was no prejudice." RUAA § 12 cmt. 4.

[FN108]. Ariz. Rev. Stat. Ann. § 12-3004(B)(3).

[FN109]. Id. § 12-3012(F).

[FN110]. In J.J. Craviolini v. Scholer & Fuller Associate Architects, 357 P.2d 611, 613 (Ariz. 1961), the Arizona Supreme Court held that when an architect is empowered by parties to resolve disputes between them, the architect is functioning as an arbitrator and is entitled to immunity. On the facts of the case before it, the court found that the claim against the architect did not involve the resolution of disputes. The facts in the Craviolini decision were distinguished in Blecick v. School District No. 18 of Cochise County., 406 P.2d 750, 756 (Ariz. Ct. App. 1965), where the court found that the refusal of the architects to issue a final certificate was an act "done in their capacity as arbitrators." Citing Craviolini, the Arizona Court of Appeals, in a case involving a defamation claim, has approved a "corresponding immunity for witnesses who participate in arbitration proceedings." Yeung v. Maric, 232 P.3d 1281, 1285 (Ariz. Ct. App. 2010).

[FN111]. Ariz. Rev. Stat. Ann. § 12-3001(1). The doctrine of judicial immunity has been applied to arbitration organizations; they "are granted absolute immunity for a broad category of acts performed during the course of an arbitration proceeding." M.H. Alexander v. Am. Arbitration Ass'n, 2001 WL 868823, *4 (N.D. Cal. July 27, 2001).

[FN112]. Ariz. Rev. Stat. Ann. § 12-3014(A). One attorney in an arbitration asked the arbitrator to remove an opposing counsel from the arbitration because of his conduct. The arbitrator denied the request and called a recess. During the recess, the plaintiff alleged that the attorney whom he sought to eject assaulted him in the lobby. The arbitrator did not observe the altercation. In a suit against the arbitrator and the arbitral organization, a New Jersey court, citing its version of the RUAA and common law, dismissed the case holding that the "act of calling a recess and denying an application to remove an attorney from an arbitration proceeding falls directly within the adjudicative functions of the arbitrator." Malik v. Ruttenberg, 942 A.2d 136, 142 (N.J. Super. Ct. App. Div. 2008).

[FN113]. Ariz. Rev. Stat. Ann. § 12-3014(B).

[FN114]. Cort v. Am. Arbitration Ass'n, 795 F. Supp. 970, 973 (N.D. Cal. 1992).

[FN115]. Ariz. Rev. Stat. Ann. § 12-3014(C).

[FN116]. Id. § 12-3014(D). Judges have been permitted to testify in court proceedings in a limited category of situations. Phillips v. Clancy, 733 P.2d 300, 304-05 (Ariz. Ct. App. 1986).

[FN117]. Ariz. Rev. Stat. Ann. § 12-3014(D)(1).

[FN118]. RUAA § 14 cmt. 5.

[FN119]. Ariz. Rev. Stat. Ann. § 12-3014(D)(2). "A party's allegation of these grounds without a showing of independent, objective evidence should be insufficient to require an arbitrator to testify or produce records from the arbitration proceeding." RUAA § 14 cmt. 5.

[FN120]. Ariz. Rev. Stat. Ann. § 12-3014(E).

[FN121]. The comparable provision in the AZ-UAA is section 12-1505.

[FN122]. See Ariz. Rev. Stat. Ann. § 12-3004. Where parties adopt the rules of an arbitration organization, such as the AAA, those rules become part of the arbitration agreement. A.P. Brown Co. v. Superior Court, 490 P.2d 867, 869 (Ariz. Ct. App. 1971).

[FN123]. Ariz. Rev. Stat. Ann. § 12-3015(A). "The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute ...." AAA Commercial Rules, R-30(b).

[FN124]. Ariz. Rev. Stat. Ann. § 12-3015(A). The AAA Commercial Rules provide that an arbitrator "shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant." AAA Commercial Rules, R-31(b). "It should be noted that the rules of evidence are inapplicable in an arbitration proceeding ...." RUAA § 15 cmt. 1. If there is more than one arbitrator, the powers of an arbitrator must be exercised by a majority of the arbitrators, but the arbitration hearing must be conducted by all of the arbitrators. Ariz. Rev. Stat. Ann. § 12-3013. The comparable provision in the AZ-UAA is section 12-1504 ("The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this article.").

[FN125]. Id. § 12-3015(D).

[FN126]. Id. § 12-3015(B). The uncertainty in the AZ-UAA was created by the section that provides

that parties "are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." Id. § 12-1505(2). Some arbitrators have speculated that this language precluded consideration of motions for summary disposition and others have expressed reluctance to grant motions for summary disposition because one of the grounds for vacatur of an award is where an arbitrator refused to hear evidence material to the dispute. See id. §§ 12-1512(A)(4), 12-3023(A)(3). This concern is undoubtedly overstated. A study of 182 state and federal court cases in 2004 in which a party sought to vacate an award revealed that in only twenty-four of those cases did a party argue that the award should be vacated because the arbitrator refused to hear evidence material to the controversy. In only three of these cases was the award vacated. J. Lani Bader et al., Vacating Arbitration Awards, Disp. Res. Mag., Summer 2005, at 23.

[FN127]. Ariz. Rev. Stat. Ann. § 12-3015(B)(1)-(2).

[FN128]. Id. § 12-3015(C).

[FN129]. Id. § 12-3016. The right to be represented by counsel is a nonwaivable right in a predispute agreement to arbitrate. This provision is similar to the AZ-UAA. Id. § 12-1506. The AAA Commercial Rules provide that a party may be represented by counsel "or other authorized representative." AAA Commercial Rules, R-24. Where parties have adopted the AAA Commercial Rules a question periodically arises whether a party in arbitration in Arizona may be represented by someone who is not a licensed attorney. Because the Arizona Supreme Court has held that the representation of a party in private arbitration proceedings constitutes the practice of law, In re Creasy, 12 P.3d 214, 216-18 (Ariz. 2000), the AAA Commercial Rules could certainly not displace a decision of the Arizona Supreme Court. A related issue has to do with whether an attorney licensed in another jurisdiction can represent a party in an arbitration in Arizona. A lawyer licensed in another jurisdiction can represent a party in an arbitration (mediation or other alternative dispute resolution proceeding) in Arizona "if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission." Ariz. Rules of Prof'l Conduct R. 5.5(c)(3) (2003).

[FN130]. Compare Ariz. Rev. Stat. Ann. § 12-3017(A), with id. § 12-1507(A).

[FN131]. Id. § 12-3004(B)(1).

[FN132]. Id. § 12-3017(A). The service of subpoenas in civil actions is provided for in Rule 45 of the Arizona Rules of **Civil Procedure**. The rule also provides that the failure of a party to obey a subpoena may be deemed a contempt of court. Ariz. R. Civ. P. 45.

[FN133]. Ariz. Rev. Stat. Ann. § 12-3017(F). The payment of costs for producing documents in response to a subpoena in a judicial proceeding is covered by section 12-351. In a judicial proceeding, the failure of a person without adequate excuse to obey a subpoena is deemed a contempt of court. Ariz. R. Civ. P. 45(f). In addition, a party may enforce a subpoena issued by a court through the issuance of a Civil Arrest Warrant authorized by Rule 64.1 of the Arizona Rules of **Civil Procedure**.

Witnesses who live outside Arizona are not within the subpoena power of a court, and therefore not within the subpoena power of an arbitrator. See Ponderosa Plaza v. Siplast, 888 P.2d 1315, 1321 (Ariz. Ct. App. 1993). But see infra notes 144-46 and accompanying text.

[FN134]. Ariz. Rev. Stat. Ann. § 12-3017(B).

[FN135]. Id. § 12-3017(C). "The Drafting Committee intended that the full panoply of discovery mechanisms under modern rules of **civil procedure** would normally not be appropriate for arbitration unless the parties specifically incorporate them into their arbitration agreement." Heinsz, supra note 3, at 46-47.

[FN136]. RUAA § 17 cmt. 3.

[FN137]. Id. § 17 cmt. 4 (emphasis added).

[FN138]. Id. § 17 cmt. 2.

[FN139]. See Ariz. Rev. Stat. Ann. § 12-3017(C). Because this section is waivable, it is "intended to encourage parties to negotiate their own discovery procedures." RUAA § 17 cmt. 3.

[FN140]. Compare Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (an arbitrator's subpoena authority under section 7 of the FAA does not include the authority to subpoena nonparties for prehearing discovery), with In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 872 (8th Cir. 2000) (implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing). There is no controlling authority on this issue in the Ninth Circuit. Because of the "unclear case law," this section "specifically states that arbitrators have subpoena authority for discovery matters under the RUAA." RUAA, § 17 cmt. 6.

[FN141]. Ariz. Rev. Stat. Ann. § 12-3017(D). This section grants to arbitrators all of the power judges have to enforce discovery orders. See Ariz. R. Civ. P. 37. See generally Philip D. O'Neill, The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse, 60 Disp. Res. J. 60 (Nov. 2005-Jan. 2006). Even in the absence of specific statutory authority arbitrators have been found to have the power to impose sanctions under the bad faith exception to the American Rule regarding the award of attorneys' fees, Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1064-65 (9th Cir. 1991), and the authority granted to arbitrators under the terms of an arbitration agreement. E.g., Reliastar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 86-87 (2d Cir. 2009) (a broad arbitration clause confers authority on arbitrators to sanction a party that participates in bad faith); Pollin v. Kellwood Co., 103 F. Supp.2d 238, 242 (S.D.N.Y. 2000) (agreement permitted arbitrators to grant any remedy or relief that would be available in court).

[FN142]. Ariz. Rev. Stat. Ann. § 12-3017(A). Because arbitration awards are not self-enforcing, "a nonparty who disagrees with a subpoena or other order issued by an arbitrator simply need not

comply. At that point the party to the arbitration proceeding who wants the nonparty to testify or produce information must proceed in court to enforce the arbitral order." RUAA § 17 cmt. 8.

[FN143]. Ariz. Rev. Stat. Ann. § 12-3017(E).

[FN144]. Id. § 12-3017(G).

[FN145]. Heinsz, supra note 3, at 50-51.

[FN146]. Id.

[FN147]. Ariz. Rev. Stat. Ann. § 12-3019(A). The term "otherwise authenticated" is "intended to conform with the Electronic Signatures in Global and National Commerce Act." This means that an "arbitrator can execute an award by an electronic signature which is intended to mean 'an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.'" RUAA § 19 cmt. (citation omitted). The comparable provision in the AZ-UAA is section 12-1508(A).

[FN148]. Ariz. Rev. Stat. Ann.§ 12-3019(A).

[FN149]. See id. § 12-3004.

[FN150]. Id. § 12-3019(B). The comparable provision in the AZ-UAA is section 12-1508(B). The AAA Commercial Rules provide that an award shall be made no later than thirty days from the closing of the hearing. AAA Commercial Rules, R-41.

[FN151]. Ariz. Rev. Stat. Ann. § 12-3019(B).

[FN152]. Id. § 12-3018. The AZ-UAA does not address preaward rulings by arbitrators.

[FN153]. "The intent of the term 'expedited' is that a court should, to the extent possible, advance on the docket a matter involving the enforcement of an arbitrator's preaward ruling in order to preserve the integrity of the arbitration proceeding which is underway." RUAA § 18 cmt. 2.

[FN154]. Id. § 18 cmt. 4.

[FN155]. See Ariz. Rev. Stat. Ann. § 12-2101.01.

[FN156]. "The functus officio doctrine provides that an arbitration panel is without authority to reconsider an issue once the panel has issued a final decision ...." U.S. Life Ins. Co. v. Superior Nat'l Ins. Co., 591 F.3d 1167, 1177 n.11 (9th Cir. 2010). Under federal arbitration law there are exceptions to this rule: "an arbitrator can correct a mistake which is apparent on the face of his award, complete an arbitration if an award is not complete, and clarify an ambiguity in the award." McClatchy

Newspapers v. Cent. Valley Typographical Union No. 46, 686 F.2d 731, 734 n.1 (9th Cir. 1982). Unlike the RUAA, however, the FAA has no statutory grounds by which an award may be modified or corrected. By their agreement, parties can also grant an arbitrator the power to modify or correct an award. AAA Commercial Rules, R-46.

[FN157]. Under the comparable provision of the New Jersey arbitration law, a court held that this section did not permit an "arbitrator to change his or her mind or to reconsider his or her decision in the guise of clarification." Kimm v. Blisset, LLC, 905 A.2d 887, 897 (N.J. Super. Ct. App. Div. 2006). Under the AZ-UAA, the rules permitting a modification or correction of an award by an arbitrator are found in section 12-1509.

[FN158]. Ariz. Rev. Stat. Ann. § 12-3020(B).

[FN159]. Id. § 12-3020(C).

[FN160]. Id. § 12-3020(D).

[FN161]. Id. § 12-3020(E).

[FN162]. Because the AZ-UAA makes no reference to punitive damages a question arises whether punitive damages may now be awarded in arbitrations under the AZ-UAA. This is unlike a situation where the legislature changes the language of a statute in which case courts commonly conclude the legislature intended to change the law. Brousseau v. Fitzgerald, 675 P.2d 713, 715 (Ariz. 1984). Because it has been well established that arbitrators have the authority to award punitive damages, see RUAA § 21 cmt. 1, and because the issue of punitive damages in arbitration was not singled out for legislative action but was part of the creation of a new statutory scheme, Rowe Int'l, Inc. v. Ariz. Dep't of Revenue, 796 P.2d 924, 930 (Ariz. Ct. App. 1990), I believe that the new provision clarifies the power arbitrators already have under the AZ-UAA.

[FN163]. Under the wording of this section, an award of punitive damages must be authorized under applicable law. The "parties by agreement cannot confer such authority on an arbitrator where the arbitrator by law could not otherwise award such relief." RUAA § 21 cmt. 1.

[FN164]. Ariz. Rev. Stat. Ann. § 12-3021(A). "Exemplary relief" is the same as punitive damages. Cf. Haralson v. Fisher Surveying, Inc., 31 P.3d 114, 120 (Ariz. 2001) (Jones, J., concurring). In Arizona, punitive damages in a civil action are appropriate only if the defendant's conduct or motive involves "some element of outrage similar to that usually found in crime." Gurule v. Ill. Mut. Life & Cas. Co., 734 P.2d 85, 86 (Ariz. 1987) (internal quotations omitted). A defendant must act "with a knowing, culpable state of mind, or defendant's conduct was so egregious that the requisite mental state can be inferred." Id.

[FN165]. Ariz. Rev. Stat. Ann. § 12-3021(E). This language permits a reviewing court to "pass upon the legal propriety of a punitive damages award." Heinsz, supra note 3, at 24. Thus, this section

establishes a standard of judicial review of punitive damage awards different than the standard of judicial review applicable to other arbitral rulings.

[FN166]. Ariz. Rev. Stat. Ann. § 12-3021(B).

[FN167]. 882 P.2d 1274, 1278 (Ariz. 1994).

[FN168]. This statute provides that in "any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Ariz. Rev. Stat. Ann. § 12-341.01(A).

[FN169]. Id. § 12-3021(C). A comparable provision in the AZ-UAA provides that the "fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." Id. § 12-1512(A)(5). Of course, an arbitrator's power is not without limits. E.g., Bosack v. Soward, 586 F.3d 1096, 1106 (9th Cir. 2009) (an arbitration award must "draw its essence" from the parties' agreement).

[FN170]. RUAA § 21(c) cmt. 3; see Heinsz, supra note 3, at 22. The Supreme Court of Utah cited this provision in Utah's arbitration law holding that the "broad grants" of authority to arbitrators were an additional reason why the court permitted an arbitrator to remove members of a limited liability company. Duke v. Graham, 158 P.3d 540, 546 (Utah 2007); cf. Snowberger v. Young, 536 P.2d 1069, 1072 (Ariz. Ct. App. 1975). In my experience, it would be extremely rare for an arbitrator to award a remedy not permissible in court.

[FN171]. Ariz. Rev. Stat. Ann. § 12-3004(A).

[FN172]. The limitation on expenses under the AZ-RUAA to those recoverable in a comparable civil action constitutes a significant change as no such restriction exists under the AZ-UAA. Ariz. Rev. Stat. Ann § 12-1510.

[FN173]. Id. § 12-3021(B). See generally Lisa Duran & Alison Pulaski Carter, Recovery of Costs and Fees for Non-Lawyer Services, in Arizona Attorneys' Fees Manual §§ 9.1-9.6 (2010 ed.). In addition to the recovery of expenses permitted in a comparable civil action, parties in their arbitration agreement may authorize the award of other expenses not otherwise authorized by law. RUAA § 21 cmt. 2.

[FN174]. Ariz. Rev. Stat. Ann. § 12-3021(D).

[FN175]. Id. § 12-3022. A Hawaii appellate court rejected the argument that a case is moot where an award has been satisfied. Applying its adoption of the RUAA, the court held that an award should be confirmed regardless of whether the award has been satisfied prior to confirmation. Mikelson v. United Servs. Auto. Ass'n, 227 P.3d 559, 565 (Haw. Ct. App. 2010).

[FN176]. There is also no time limit under existing law. Ariz. Rev. Stat. Ann. § 12-1511; Fisher v. Nat'l Gen. Ins. Co., 965 P.2d 100, 103 (Ariz. Ct. App. 1998).

[FN177]. RUAA § 22 cmt. 2.

[FN178]. Ariz. Rev. Stat. Ann. § 12-1551.

[FN179]. Id. § 12-1511. The AZ-UAA contains no time limit within which a motion to vacate an award must be filed. Id. § 12-1512; Morgan v. Carillon Invest., Inc., 109 P.3d 82, 82-83 (Ariz. 2005). Under the AZ-UAA, to avoid the uncertainty of an indefinite time within which a motion to vacate may be filed, by filing a motion to confirm an award under section 12-1511, a party opposing the motion has twenty days within which to oppose the motion under section 12-1512.

[FN180]. Ariz. Rev. Stat. Ann. § 12-3023(B).

[FN181]. Id.

[FN182]. The Oregon adoption of the RUAA has a better alternative providing that after a motion to confirm an award is filed, the court must confirm the award unless a motion to vacate or modify the award is filed within twenty days. Or. Rev. Stat. § 36.700(1) (Westlaw through 2010 Legis. Sess.).

[FN183]. Ariz. Rev. Stat. Ann. § 12-3023(A). The comparable section in the AZ-UAA is section 12-1512. The section on vacatur is one that cannot be waived by the parties, even after a dispute arises. Id. § 12-3004(C). "Parties cannot waive or vary the statutory grounds for vacatur ...." RUAA § 4 cmt. 4(e). An agreement to preclude completely any judicial review of an arbitration award has been held unenforceable because it deprives a court of the ability to follow the standards of review which "themselves embody legislative and judicial determinations as to the appropriate level and scope of review." Van Duren v. Rzasa-Ormes, 926 A.2d 372, 381 (N.J. Super. Ct. 2007). Similarly, in Optimer International, Inc. v. RP Bellevue, LLC, 214 P.3d 954, 958 (Wash. Ct. App. 2009), the parties' arbitration agreement provided that the decision of the arbitrator would be final and nonappealable. After the award was entered, the losing party appealed claiming that the arbitrator exceeded his powers. The court of appeals held that the restriction on judicial review of the award in the arbitration agreement was invalidated by the provision in the Washington statute, identical to the AZ-RUAA, that prohibited any waiver of the grounds for judicial review of arbitration awards. Id. at 960. The court also rejected the argument that the Washington statute was unconstitutional as an impairment of contract rights. Id. These decisions seem highly questionable at least where the parties to an arbitration agreement have comparable bargaining strength. Indeed, courts have upheld these agreements where the parties have clearly indicated their intent to eliminate all judicial review. See Aerojet-Gen. Corp. v. Am. Arbitration Ass'n, 478 F.2d 248, 251-52 (9th Cir. 1973). On the other hand, in an adhesion contract it would undoubtedly be unconscionable for the stronger party to compel the weaker party to give up any judicial review of an arbitration award.

[FN184]. Following cases interpreting section 10 of the FAA, the Arizona Court of Appeals held

under the AZ-UAA, that "undue means" requires proof of intentional misconduct amounting to bad faith in the procurement of the arbitration award. FIA Card Servs., N.A. v. Levy, 200 P.3d 1020, 1022 (Ariz. Ct. App. 2008). An arbitration award was vacated on the grounds of undue means where the court found that the arbitrator's contact with counsel for a party "was impermissible under the rules of arbitration and tainted the deliberation proceedings." Goldsberry v. Hohn, 583 P.2d 1360, 1363 (Ariz. Ct. App. 1978).

[FN185]. Following federal cases interpreting the comparable provision in section 10 of the FAA, the Arizona Court of Appeals, noting that each case must be decided on its specific facts, held "evident partiality" means the "appearance of bias" or where a reasonable person would conclude that an arbitrator was "partial to one party to the arbitration." Wages v. Smith Barney Harris Upham & Co., 937 P.2d 715, 720-21 (Ariz. Ct. App. 1997). The Oregon appellate court defined evident partiality this way in a recent interpretation of the same provision in its adoption of the RUAA: "To establish evident partiality, the objecting party need only show that the arbitrator was inclined to favor one side, not that the arbitrator actually acted upon that inclination, such that the arbitrator's decision was affected to the detriment of the other party." Prime Props., Inc. v. Leahy, 228 P.3d 617, 621 (Or. Ct. App. 2010). Evident partiality as a basis to vacate an award does not apply to evident partiality by an arbitration organization. FIA Card Servs., 200 P.3d at 1023. Evident partiality applies to "vacatur only for a neutral arbitrator ... because non-neutral arbitrators, unless otherwise agreed, serve as representatives of the parties appointing them. As such, these non-neutral, party-appointed arbitrators are not expected to be impartial in the same sense as neutral arbitrators." RUAA § 23 cmt. 1.

[FN186]. A comparable provision in the Utah statute was described this way:

> [An] arbitrator's discovery decisions can provide grounds for vacatur if those decisions prevent a party from exercising statutorily-guaranteed rights to an extent that 'substantially prejudice[s]' the complaining party. At a minimum, a discovery decision must be sufficiently egregious that the [superior] court is able to identify specifically what the injustice is and how the injustice can be remedied.
>
> Hicks v. UBS Fin. Servs., Inc., 226 P.3d 762, 771 (Utah Ct. App. 2010).

[FN187]. Where judicial review is sought on the ground that an arbitrator exceeded his power, it is presumed that the arbitrator decided only those issues submitted for arbitration. Einhorn v. Valley Med. Specialists, 838 P.2d 1332 (Ariz. Ct App. 1992). "The boundaries of the arbitrators' powers are defined by the agreement of the parties." Smitty's Super-Valu, Inc. v. Pasqualetti, 525 P.2d 309, 311 (Ariz. Ct. App. 1974); e.g., Mosely v. Brewer, 679 P.2d 563, 565 (Ariz. Ct. App. 1984); Goldsberry, 583 P.2d at 1364. There is no requirement that an arbitrator "makes findings or give reasons for his conclusion." Safety Control, Inc. v. Verwin, Inc., 494 P.2d 740, 743 (Ariz. Ct. App. 1972). Nor will a court review whether an arbitrator correctly applied the law. Hembree v. Broadway Realty & Trust Co., 728 P.2d 288, 294 (Ariz. Ct. App. 1986). An issue of arbitrability may be raised in an application to vacate an award on the grounds that the arbitrator exceeded his power where there was no agreement to arbitrate. See Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081, 1084 (Ariz. Ct. App. 2003).

[FN188]. The purpose of this section is to "establish that if there is no valid arbitration agreement, then the award can be vacated; however, the right to challenge an award on this ground is conditioned upon the party who contests the validity of an arbitration agreement raising this objection no later than the beginning of the arbitration hearing." RUAA § 23 cmt. 2. This basis for vacating an arbitration award should not be viewed as undoing the well-established doctrine that nonsignatories to arbitration agreements, may, under certain circumstances, be able to compel arbitration or may be compelled to arbitrate. See Schoneberger v. Oelze, 96 P.3d 1078, 1081 n.5 (Ariz. Ct. App. 2004) ("Under well-established common law principles, a nonsignatory may be entitled to enforce, or be bound by, an arbitration provision in a contract executed by others.").

[FN189]. This ground for vacating an arbitration award is not in the AZ-UAA.

[FN190]. Ariz. Rev. Stat. Ann. § 12-3023(C) (Westlaw through 2011 Legis. Sess.).

[FN191]. Id.

[FN192]. Id.

[FN193]. Id.

[FN194]. 552 U.S. 576 (2008).

[FN195]. Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277 (9th Cir. 2009). To be in manifest disregard of the law, it must be clear from the record that the arbitrator recognized the applicable law and ignored it. Id. at 1290.

[FN196]. RUAA § 23 cmt. C(5). Because the public policy ground for vacating an arbitration award existed in the District of Columbia before its adoption of the RUAA, the District of Columbia Court of Appeals held that the doctrine remains alive in the District. A1 Team USA Holdings, LLC v. Bingham McCutchen LLP, 998 A.2d 320, 327 (D.C. 2010). The District of Columbia's adoption of the RUAA includes a provision different than the RUAA. It provides that an award may be vacated "on other reasonable ground[s]." Id. The court in A1 Team USA Holdings held that this provision did not authorize "merits" review of an arbitration award. Id. at 326. The Nevada Supreme Court has held that its arbitration law permits judicial review based on nonstatutory grounds, such as manifest disregard of the law, or where an award is arbitrary, capricious or unsupported by the agreement. Bohlmann v. Byron John Printz & Ash, Inc., 96 P.3d 1155, 1157 (Nev. 2004).

[FN197]. Heinsz, supra note 3, at 35.

[FN198]. RUAA § 23 cmt. B; see Heinsz, supra note 3, at 27-30.

No single issue consumed more of the Drafting Committee's time and energies than the question of whether section 23 of the RUAA should incorporate a provision expressly permitting

parties to contractually "opt-in" to either judicial or appellate arbitral review of arbitration awards for errors of law, fact, or any other grounds not prohibited by applicable law.

Stephen L. Hayford, Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act, 2001 J. Disp. Resol. 67, 84 (2001).
[FN199]. RUAA § 23 cmt. B(5). "As the Official Comments make clear, however, the decision not to include an opt-in section in the RUAA was not intended to prohibit parties from agreeing to such review where appropriate." Heinsz, supra note 3, at 30.

[FN200]. E.g., Brake Masters Sys., Inc. v. Gabbay, 78 P.3d 1081 (Ariz. Ct. App. 2003); Creative Builders, Inc. v. Ave. Devs., Inc., 715 P.2d 308, 312 (Ariz. Ct. App. 1986); Pawlicki v. Farmers Ins. Co., 618 P.2d 1096 (Ariz. Ct. App. 1980).

[FN201]. Compare Ariz. Rev. Stat. Ann. § 12-3024 (Westlaw through 2011 Legis. Sess.), with id. § 12-1513.

[FN202]. Id. § 12-3024(B). A North Carolina appellate court held that this section does not permit a trial court to modify an award to include prejudgment interest if not provided for in the arbitration award. Blanton v. Isenhower, 674 S.E.2d 694 (N.C. Ct. App. 2009).

[FN203]. Ariz. Rev. Stat. Ann. § 12-3024(C).

[FN204]. Id. § 12-3025(A).

[FN205]. Id. A similar provision exists under the AZ-UAA. Id. § 12-1514.

[FN206]. Id. § 12-3025(B).

[FN207]. Id. § 12-3025(C). The right to recover attorneys' fees in connection with proceedings in which an award is challenged was included in the RUAA by the Drafting Committee to discourage "unwarranted assaults on arbitral determinations." Heinsz, supra note 3, at 36.

> [The Drafing Committee] meant for a court to use its discretion ... to take into account equitable considerations. Where the appropriateness of an arbitrator's decision is a close question or the public interest is enhanced by making the law clearer in the area of vacatur, a court should not hesitate to withhold attorney's fees and other costs if that would better serve the interests of justice.

Id. at 37. "The right to recover post-award litigation expenses does not apply if a party's resistance to the award is entirely passive ...." RUAA § 25 cmt. 4. Interpreting the similar provision in the Hawaii statute, its intermediate appellate court held that the right to recover attorneys' fees applied to proceedings covered in section 12-3025(C) and not proceedings incurred in a judicial proceeding to enforce a judgment. United Pub. Workers Local 646 v. City & Cnty. of Honolulu, 194 P.3d 1163, 1170 (Haw. Ct. App. 2008).
[FN208]. RUAA § 25 cmt. 3.

[FN209]. Ariz. Rev. Stat. Ann. § 12-3026(A). "This provision intends to prevent a party, particularly one with superior bargaining power, from requiring the other party to determine the enforceability of an arbitration agreement only in a distant forum." Heinsz, supra note 3, at 51. Any state with jurisdiction over the dispute and the parties may enforce an agreement to arbitrate. RUAA § 26 cmt. 2. Where there is an independent basis of federal court jurisdiction, a federal court may enforce an agreement to arbitrate. United States v. Park Place Assocs., Ltd., 563 F.3d 907, 918-19 (9th Cir. 2009).

[FN210]. Ariz. Rev. Stat. Ann. § 12-3026(B).

[FN211]. Even though this section uses the word "judgment," it is intended to apply to the confirmation of an award. RUAA § 26 cmt. 3.

[FN212]. Id.

[FN213]. Ariz. Rev. Stat. Ann. § 12-3027. The venue provision is intended to give "priority to the county in which the arbitration hearing was held." RUAA § 27 cmt. 1. Under the AZ-UAA "venue of the appropriate superior court shall be determined as in any other civil action." Ariz. Rev. Stat. Ann. § 12-1516.

[FN214]. Ariz. Rev. Stat. Ann. § 12-3027.

[FN215]. Id. § 12-2101.01(B). The Arizona Rules of Civil Appellate Procedure are thereafter applicable to appeals from arbitration awards. Susan M. Freeman & Paul G. Ulrich, Civil Appeals, in Arizona Appellate Handbook § 3.2.1.1.5 (3d ed. Supp. 1996).

[FN216]. Ariz. Rev. Stat. Ann. § 12-2101.01(A)(1); Rocz v. Drexel Burnham Lambert, Inc., 743 P.2d 971, 973 (Ariz. Ct. App. 1987) (the "[d]enial of a motion to compel arbitration is substantively appealable"). In Dusold v. Porta-John Corp., 807 P.2d 526 (Ariz. Ct. App. 1990), the Arizona Court of Appeals held that a judgment containing Rule 54(b) language dismissing all claims against a party and compelling arbitration was a final, appealable judgment under section 12-2101(B). The court distinguished its decision from Roeder v. Huish, 467 P.2d 902 (Ariz. 1970), where the Arizona Supreme Court held that an order compelling arbitration was not an appealable order and issues such as arbitrability and waiver of the right to arbitrate may be raised at the time an award is confirmed. See Ruesga v. Kindred Nursing Ctrs. W., LLC, 161 P.3d 1253, 1259 (Ariz. Ct. App. 2007) (trial court order compelling arbitration but neither dismissing any claims nor including Rule 54(b) language is not appealable).

[FN217]. Ariz. Rev. Stat. Ann. § 12-2101.01(A)(2).

[FN218]. Id. § 12-2101.01(A)(3). Unlike provisions (A)(1) and (A)(2) above, this section does not distinguish between the AZ-UAA and the AZ-RUAA. Nevertheless, it would presumably apply to

orders denying confirmation under sections 12-1512 and 12-3025. Because the AZ-RUAA permits a court to deny confirmation of an award, vacate the award and direct a hearing, id. § 12-3023(C), a question arises whether such orders are appealable. The Supreme Court of Nevada has held that because such orders do not "bring an element of finality to the arbitration process," they are not appealable. Karcher Firestoppping v. Meadow Valley Contractors, Inc., 204 P.3d 1262, 1266 (Nev. 2009).

[FN219]. Ariz. Rev. Stat. Ann. § 12-2101.01(A)(4). Unlike provisions (A)(1) and (A)(2) above, this section does not distinguish between the AZ-UAA and the AZ-RUAA. Nevertheless, it would presumably apply to orders modifying or correcting an award under sections 12-1513 and 12-3024.

[FN220]. Id. § 12-2101.01(A)(5). Unlike provisions (A)(1) and (A)(2) above, this section does not distinguish between the AZ-UAA and the AZ-RUAA. Nevertheless, it would presumably apply to orders vacating an award without a rehearing under sections 12-1512 and 12-3025.

[FN221]. Id. § 12-2101.01(6).

[FN222]. 977 P.2d 769, 776 (Ariz. 1999).